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Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-497

THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

THE CHEROKEE NATION, THE CHOCTAW NATION, and
THE CHICKASAW NATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1972

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, the State of Oklahoma, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-captioned case on June 1, 1972, in Causes No. 71-1210 and 71-1295 in that court.

CITATIONS TO OPINION BELOW

The district court did not write an opinion in the case and the opinion of the Court of Appeals for the Tenth Circuit is reported at 461 F.2d 674 (1972). Copies of the decision of the district court and of the Court of Appeals for the Tenth Circuit are contained in the appendices to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 1, 1972, and its Order Denying Petition for Rehearing was entered on June 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. Whether the Indian tribes, who held fee simple title to the bed of the Arkansas River under patents issued to them in 1838 and 1842, held that title in a sovereign capacity, or for purely private purposes?

2. Did the Indian tribes retain any private property ownership of the beds of navigable rivers *after* their sovereignty and powers of government were relinquished by agreements with the United States under the several Acts of Congress of the 1890's and early 1900's?

STATEMENT OF THE CASE

The petitioner concedes that the Cherokee and Choctaw Nations received fee simple title to the bed of the navigable portion of the Arkansas River from its confluence with the Grand River in Oklahoma to the Oklahoma-Arkansas border by reason of the treaties of 1830 and 1835, and the patents issued pursuant thereto, as was held in the case of *Choctaw Nation, et al.* v. *Oklahoma,* 397 U.S. 620 (1970). There will be no attempt to relitigate that question. The question still remains of whether fee simple title was granted to the bed of the Arkansas River to the Cherokees

and Choctaws in the capacity of a sovereign, and, if so, whether the Cherokees and Choctaws can retain private property ownership to the bed of the Arkansas River after their sovereignty or powers of government were surrendered by agreement to the United States prior to, and with a view to, the admission of a new state or states to the Union.

The petitioner contends that the district court and the Court of Appeals misapplied and misconstrued the decision in *Choctaw Nation* v. *Oklahoma, supra,* thereby creating a conflict between its decision and the decision of the Supreme Court in the *Choctaw Nation* case.

Following the decision in *Choctaw Nation* v. *Oklahoma, supra,* the parties returned to the United States District Court for the Eastern District of Oklahoma for further proceedings consistent with that opinion, as they were directed to do by the Supreme Court.

A pretrial conference was held before the district court on August 14, 1970, for the purpose of determining what issues were unresolved and what further proceedings were required. (Appendix D-2)

At the conclusion of the pretrial conference, the court determined one of the remaining issues for decision to be whether "the act of April 26, 1906 (34 Stat. 137), restored ownership of the entire navigable portion of the riverbed in the United States, since the tribes were required under the law to hold in trust for the public all navigable waters within their respective domains. This act, the defendants claim, deprived both tribes of their status as governmental sovereigns and in the absence of such status they were no

longer capable of holding the navigable waters in trust, resulting as a consequence in the reverting of ownership to the United States, and subsequently, in the transfer of ownership to the State of Oklahoma." (Appendix D-3)

On January 12, 1971, the district court entered another pretrial order setting out its decision on the issues remaining for disposition. The court stated:

> "The first of these, whether the title and interest claims of the defendants are properly the subject of further proceedings in this court, depends upon whether they were disposed of by the United States Supreme Court in *Choctaw Nation, et al.*, v. *Oklahoma, et al*, 397 U.S. 620. It is the opinion of this court that they were disposed of; that the decision of the Supreme Court precludes any finding here that prior to Oklahoma's admission to the Union ownership of the riverbed was restored to the United States through loss by the Indian nations of their status as governmental sovereigns, as contended by the defendants, ..." (Appendix C-1)

On April 14, 1971, the district court entered its judgment in accordance with the pretrial orders of August 19, 1970, and January 12, 1971, set out above. (Appendix B)

On appeal to the United States Court of Appeals for the Tenth Circuit, one of the issues was stated to be:

> "Oklahoma and its lessees argue that the Supreme Court did not confirm present title to the riverbed in the Indians but decided only that they received ownership under the grants and treaties of 1830 and 1835. Hence, they say that the question of present ownership is still open. We do not agree." (Appendix A-5)

In the holding of the Court of Appeals, appears the following language:

> "A fair reading of the opinions, majority, concurring, and dissenting, of the Supreme Court, requires the conclusion that the Supreme Counrt decided present ownership. See 397 U.S. at 621, 638-639, and 643." (Appendix A-5-6)

> "If we are wrong in what we believe to be the fair import of the Supreme Court decision, consideration must be given to the claims now asserted by Oklahoma and its lessees. Divestiture is claimed on the ground that the Indians received title to the bed in their sovereign capacity as a public trust for the common benefit, that sovereignty was lost prior to Oklahoma statehood, that the bed reverted to the United States, and that title passed to Oklahoma under the equal footing doctrine uopn its admission to the Union in 1907." (Appendix A-6)

The Court of Appeals went ahead to consider whether loss of sovereignty occurred by reason of the several acts of Congress up to and including the Act of April 26, 1906, 34 Stat. 137. The Court held in this regard:

> "The mentioned statutes did eliminate whatever sovereignty the Indians then had. However, we are not concerned with sovereignty, a political issue, but with land ownership. The question is not whether the Indians have sovereignty but whether the tribes are still in existence and capable of land ownership. We believe this question is answered by the 1906 Act. Section 27 thereof provides that, upon dissolution of the tribes, lands belonging to them shall not become public lands nor the property of the United States but shall be held by the United States in trust for the Indians. . . .

• • • • • •

"We adhere to the conclusion, which was implicit in our first decision, that the Indians have not divested themselves of the land in question. The claims of Oklahoma and its lessees must be rejected." (Appendix A-7)

It is from this decision of the United States Court of Appeals for the Tenth Circuit that the petitioner seeks review by the Supreme Court.

REASONS FOR GRANTING THE WRIT

I

The substantial rights of many private citizens and governmental entities are dependent upon a definitive answer to the question which the Tenth Circuit Court of Appeals only partially answered and avoided as to the remainder.

The State of Oklahoma, the Indian nations, the riparian owners, and the United States Government, among others, need a final determination of the question of whether the grants of a fee simple title to the beds of the navigable rivers, within the territory granted to the Indian nations, was made to them in the capacity of a sovereign, or whether the grants were made to them for purely private purposes.

The Tenth Circuit Court of Appeals held, "The mentioned statutes did eliminate whatever sovereignty the In-

dians then had."[1] (Appendix A-7). However, the Tenth Circuit Court of Appeals side-stepped and left unanswered the question of whether the Indian nations held fee simple title to the beds of the navigable rivers in the capacity of a sovereign.

The avoidance of this question leaves in doubt and unanswered many of the issues in actions now pending and in actions yet to be filed.

For example, the United States Government has converted to its use much of the Arkansas riverbed for the location of locks and dams in the furtherance of the Arkansas River Navigation Project. The United States Government has also made plans to use much of the land that was formerly between the high water marks of the river for recreational areas and other purposes. The riparian owners have made many uses of the abutting riverbed lands including the building of wharves, bridges and other structures and other uses not related to navigation or trade and commerce. The State of Oklahoma has also made use of the riverbed lands for the building of wharves, bridges and other structures and other purposes not related to navigation or trade and commerce.

To leave this question unanswered, denies the lower courts of a definitive guide by which to govern the rights

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[1] Act of March 3, 1893, 27 Stat. 612, 645, creating the Dawes Commission; the following negotiations for the extinguishment of tribal title; the Act of June 28, 1898, 30 Stat. 495, 505, providing for the allotment of Choctaw lands; the Agreement with the Choctaws for land allotment and the nullification of inconsistent treatics, Act of July 1, 1902, 32 Stat. 641; a similar agreement with the Cherokees, Act of July 1, 1902, 32 Stat. 716; and the Act of April 26, 1906, 34 Stat. 137.

of the parties presently engaged in pending litigation, and the rights of those parties to litigation which will surely follow.

The Tenth Circuit Court of Appeals turned its decision in another direction by holding:

> "However, we are not concerned with sovereignty, a political issue, but with land ownership. The question is not whether the Indians have sovereignty but whether the tribes are still in existence and capable of land ownership." (Appendix A-7)

Petitioner submits that this statement avoids the very issue which the State, the Indian nations, the riparian owners, and the United States Government (as condemnor of the lock and dam site locations, and recreational areas, on the Arkansas River) badly need before this litigation and other litigation can be resolved with finality.

II

Petitioner also submits that the Tenth Circuit Court of Appeals erred by holding that the question is not whether the Indians have sovereignty, but whether the tribes are still in existence and capable of land ownership.

The petitioner takes the position that the question of whether the Indian nations acquired fee simple title to the beds of the navigable rivers in the capacity of a sovereign, or whether they took fee simple title to the beds of the navigable rivers for purely private purposes is indeed the central issue in this litigation and other litigation involving the same lands.

If it should be determined that the Indian nations were granted fee simple title to the beds of the navigable rivers in the capacity of a sovereign, or by reason of their governmental powers, then their subsequent loss of sovereignty, prior to the time Oklahoma was admitted to the Union, would indeed be a determining factor in this litigation and other litigation.

Let us then turn to the issue whether the Indian nations were granted fee simple title to the bed of the Arkansas River in the capacity of a sovereign, or whether they were granted fee simple title to the bed of the Arkansas River for purely private purposes.

No one would seriously contest the proposition that the States of the Union hold fee simple title to the lands underlying their navigable rivers, and that they hold fee simple title to the common benefit of all. For that matter, the same would hold true for the United States itself.

However, it is doubtful whether it could be said that a state would retain private property ownership of the lands underlying its navigable rivers should that state cease its sovereignty, or transfer the sovereignty over those lands to another state. The converse would surely be true, if one state acquired sovereignty over lands formerly belonging to another state. The transferee state would acquire fee simple title to the lands underlying the navigable rivers in the newly acquired territory, and the transferor state would, by the acts of the transfer of sovereignty, surrender its fee simple title to those lands underlying the navigable rivers in the territory transferred. It is the attribute of sovereignty or the power of government that de-

termines ownership of lands under navigable waters, not merely continued existence or capacity to own land generally.

The above is a simplified statement of the general rule of law that ownership of lands underlying navigable waters follows transfers of political sovereignty. The cases establishing this principle are *Martin* v. *Waddell*, 16 Pet. 367, 10 L.Ed. 997 (1837); *Massachusetts* v. *New York*, 271 U.S. 65, 70 L.Ed. 838 (1926); *United States* v. *Oregon*, 295 U.S. 1, 79 L.Ed. 1267 (1934); and *United States* v. *Texas*, 339 U.S. 707, 97 L.Ed. 1221 (1950). See *New Jersey* v. *Delaware*, 291 U.S. 361, 78 L.Ed. 847 (1934).

These cases establish a strong presumption against separation of ownership of lands underlying navigable waters from sovereignty, and this presumption operates transfer of such ownership upon surrender of sovereignty even though the parties do not think of the submerged lands, and the lands are not referred to in the instruments whereby sovereignty is transferred. This result obtains without any expression of intent on the part of the parties.

The doctrine favoring the inseparability of ownership of lands underlying navigable waters and political sovereignty, is closely akin to the "equal footing doctrine." *Shively* v. *Bowlby*, 152 U.S. 1, 38 L.Ed. 331 (1893); *United States* v. *Holt State Bank*, 270 U.S. 49, 70 L.Ed. 465 (1926); and *Utah* v. *United States*, 403 U.S. 9, 29 L.Ed.2d 279 (1971). These cases establish the rule that ownership of lands underlying navigable waters are retained by the United States, pending admission of a new sovereign state, at which time ownership passes, with local sovereignty, to the newly created state.

In 1830 and 1835, at the time of the Treaty of Dancing Rabbit Creek and in the Treaty of New Echota, the Cherokees and Choctaws were, "[I]n many respects . . . promised virtually complete sovereignty over their new lands." *Choctaw Nation* v. *Oklahoma*, 397 U.S. at page 635. And, at that time, the Cherokees and Choctaws, "had long been considered sovereign entities . . ." and the grants to them "were undoubtedly to them as 'a political society.'" *Id.*, at pages 631-632, Note 8. Also, in 1830 and 1835 the Cherokees and Choctaws ". . . were indeed constituted as the sovereign autonomy established in lieu of a prospective state." 397 U.S. at 638, Douglas, J., concurring.

But by the time of 1906, by virtue of the passage of several Acts of Congress, "The mentioned statutes did eliminate whatever sovereignty the Indians then had." (Appendix A-7, 10th Circuit Decision)

This was the very intent of the Act of March 3, 1893, 27 Stat. 612 (creating the Dawes Commission), when it stated, ". . . for the purpose of extinguishment of the *national* or tribal title to any lands within the territory now held by any and all of such nations or tribes, either by *cession of the same or by some part thereof to the United States, or by allotment* . . ." (Emphasis added)

In *United States* v. *Allen*, 171 Fed. 907 (Cir. Ct., Eastern District of Oklahoma, 1909), it was contended that the members of the Five Civilized Tribes were not citizens of the United States despite the amendment to the General Allotment Act passed March 3, 1901, Chapter 868, Section 6, 31 Stat. 1447. One basis for the argument was that the tribes' own governments were still in existence, which ac-

cording to the argument meant that the members held citizenship which was incompatible with the United States citizenship. The Court held that the tribal governments were continued only in the sense that corporations continued to exist in legal contemplation after they have ceased to do business, for purposes of winding up their business affairs.

> "I am not unmindful of the fact that Congress, by joint resolution of March 2, 1906 (34 Stat. 822), continued the tribal governments 'in full force and effect for all purposes under existing laws, until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members,' and that by act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876) tribal existence was 'continued in full force and effect for all purposes authorized by law until otherwise provided by law.' But by various and successive acts of Congress these tribes have been shorn of their governmental functions. Their courts have long been abolished. Their principal chief, or governor, as the case may be, is subject to removal by the President, who may fill the vacancy by appointment. Provision is made that their public school system shall be superseded by the state public school system. Tribal tax is abolished. Provision is made for the sale of their public buildings and lands. Their Legislature shall not be in session for a longer period in any one year than 30 days, and no act, ordinance, or resolution thereof, except resolutions of adjournment, are valid without approval by the President. In *Buster* v. *Wright*, 135 Fed. 951, 68 C.C.A. 509, Judge Sanborn said:
>
> > 'Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe [Creeks] of all its judicial power and curtailed its remaining authority until its powers of govern-

ment have become the merest shadows of their former selves.'

"So it is with all the Five Civilized Tribes; but there is still undistributed tribal property, and until this is divided it is essential that the tribal entity shall be maintained. In my judgment, the existence of this undistributed tribal property was the main reason for continuing the tribal existence, and such must have been the principal notice actuating Congress when the resolution of March 2, 1906, was passed, providing for the continuance of tribal existence 'until all property of such tribe, or the proceeds thereof, shall be distributed among the individual members of said tribe.' *It is a continuance of the tribe in mere legal effect, just as in many states corporations are continued as legal entities after they have ceased to do business, and are practically dissolved, for the purpose of winding up their affairs.*" 171 Fed. at 921. (Emphasis added.)

United States v. *Allen, supra,* held that the United States had no right to enforce restriction on alienation of allotted lands, and on this ultimate conclusion was reversed by the Circuit Court of Appeals for the Eighth Circuit, 179 Fed. 13 (1910), *affirmed sub. nom., Heckman* v. *United States,* 224 U.S. 413, 56 L.Ed. 820 (1912). But the Circuit Court's conclusion regarding citizenship was not disturbed.

The Supreme Court in *Choctaw Nation* v. *Oklahoma,* 397 U.S. at page 633 stated:

"Turning then to that question, we think it clear, as did the court of appeals, that the parties to the treaties and patents did not pause specifically to provide for the ownership of the riverbed."

The peitioner takes no argument with this statement, and believes it to be well founded. But, if it be true, why

then would it be necessary for the United States Government to "pause specifically" to provide that title to the beds of all navigable rivers held by the Indian nations be extinguished, when they never "paused specifically" to grant them that ownership in the first instance? Is it not equally as valid to observe that Congress assumed that ownership to the beds of all navigable rivers would be constituted in the newly created state or states? Is it not equally valid to observe that Congress was aware of the general rule of law that the ownership of lands underlying navigable waters is an attribute of sovereignty and follows the transfer of sovereignty?

There is evidence that Congress no longer considered the Indian nations to own the lands underlying the navigable waters following the agreement of the Indian nations to surrender their powers of government to the United States. This evidence is supplied by Section 25 of the Act of April 26, 1906, 34 Stat. 137. Generally, this was an act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes. Section 25 provides:

> "That any light, or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any *non-navigable stream* within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and

heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory." (Emphasis added.)

Section 25 goes on, in the second paragraph, to give to these companies the right to acquire, by condemnation, purchase or agreement between the parties, the land necessary, to accomplish the purposes intended, from any Indian tribe or nation, or municipality in the Indian Territory, or "in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee with full power of alienation. . . ."

Section 25 goes on to provide for a method by which all controversies involving compensation for the land taken was to be determined.

Why did Congress "pause specifically" to be very specific about the ownership rights of the Indian nations and individual allottees in and to "non-navigable streams," and yet not mention whatsoever any ownership rights of lands underlying navigable streams? Nowhere in the lengthy 28 paragraphs contained in the Act of April 26, 1906, *supra*, did Congress make any mention of how controversies involving the ownership of lands underlying navigable waters were to be determined. Could it be that Congress was laboring under the assumption that ownership of the

lands underlying nevigable waters would follow the transfer of sovereignty and be constituted in the new state or states which were to be created? Was it the intent of Congress to follow the general rule of law that ownership of lands underlying navigable waters follows transfers of political sovereignty.

How can Congress be expected to have the foresight to "pause specifically" in the 1890's and early 1900's to provide for the ownership of lands underlying navigable rivers, when they did not "pause specifically" to provide for the ownership of the lands underlying navigable rivers when they made the grants of these vast territories to the Indian nations in 1830 and 1835? Congress did not have the benefit of what the Supreme Court was ultimately to hold in 1970 in the case of *Choctaw Nation* v. *Oklahoma, supra,* when it was preparing the way for the creation of a new state or states to the Union from the territories that were then Indian Territory and Oklahoma Territory. But, all of their actions were reasonably calculated toward the end of admitting a new state to the Union and there were no express limitations which would limit the rights of that newly created state to something less than the other states of the Union. *There was no limitation in the Enabling Act or newly adopted Constitution providing that the newly created state would not own the lands underlying the navigable rivers flowing through what had been Indian Territory.*

In the debates in the Senate regarding H.R. 5976, which was ultimately to become the Act of April 26, 1906, 34 Stat. 137, there were lengthy debates concerning the pro-

visions of the Act for the final disposition of the affairs of the Five Civilized Tribes. Portions of that debate are contained in the Congressional Record. (See Congressional Record—Senate, February 26, 1906, commencing at page 2973.) Great and weighty issues were discussed concerning the effect of the bill to provide for the final disposition of the affairs of the Five Civilized Tribes, but nowhere in that debate is the question of the ownership of lands underlying navigable waters ever raised.

Petitioner contends that the mere extension of tribal existence by Congress was for the purpose of enabling the Indian nations to retain their private property ownership of land capable of being owned by the Indians as long as they existed as a nation or tribe. Those Acts of Congress were not intended to perpetuate ownership of lands underlying navigable rivers which the Indian nations could own only so long as they possessed the powers of government or sovereignty. The same reasoning is contained in the case of *United States* v. *Allen, supra,* when it held that the members of the Five Civilized Tribes were citizens of the United States, as opposed to being citizens under the governments of the Indian nations, and that this result was not changed by the fact that tribal governments were continued in existence for the limited purposes of winding up their business affairs.

III

In affirming the order of the district court, the Tenth Circuit Court of Appeals misconstrued and misapplied the decision of the Supreme Court in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970). (Appendix E)

The issue of whether the Indian nations were ever divested of title to the bed of the Arkansas River, either by operation of law or by agreement, never formed an issue in those proceedings. The Supreme Court stated on page 622 of the decision in *Choctaw Nation* v. *Oklahoma*, *supra*:

> "After pre-trial proceedings in the District Court, a judgment on the pleadings was entered against petitioners and in favor of the State. The District Court held that land grants made to petitioners by the United States conveyed no rights to the bed of the navigable portion of the Arkansas River. The court thus held that title to the river bed remained in the United States until 1907, when it passed to the State upon Oklahoma's admission to the Union. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court. 402 F.2d 739 (1968)."

Thus it can be readily seen that the need never arose to litigate the question of whether the Indian nations were ever divested of ownership to the bed of the Arkansas River, if they in fact obtained title to it in the first instance by reason of the treaties of 1830 and 1835 and the patents issued pursuant thereto in 1838 and 1842. The proceedings never reached that juncture since it was decided by both the district court and the court of appeals that the Indian nations never received title in the first instance.

As to the contention that the Supreme Court confirmed present title to the river bed in the Indians and did not limit itself to the narrow issue of whether they received ownership under the grants and treaties of 1830 and 1835, the petitioner would quote the following from the decision itself:

"We granted certiorari, 394 U.S. 972 (1969), to consider petitioners' claims that they received title to the land in question by treaties with the United States in 1830 and 1835.

"At the outset, we note that these cases require us to pass upon the effect of treaties that were entered into nearly a century and a half ago." (Appendix E-3)

"According to peitioners, they received title to the bed of the Arkansas River by treaty and patent from the United States. Because the land was not individually allotted or otherwise disposed of pursuant to the 1906 Act, title remained in the petitioners or passed to the United States to be held in trust for them. The State, on the other hand, claims that petitioners never received title to the land. *The courts below held in favor of the State, thus disposing of the case since it was undisputed that if title remained in the United States, it passed to Oklahoma upon admission to the Union as an incident of statehood. The sole question for review* then is whether the treaties and grants from the United States conveyed title to the bed of the Arkansas River to the Cherokee and Choctaw nations." (Emphasis added.)

"We move then to the construction and effect of the treaties between petitioners and the United States." (Appendix E-8-9)

"Applying these principles here, we conclude that the entire Arkansas River below its confluence with the Grand River was within the metes and bounds of the treaty grants to petitioners." (Appendix E-12)

"Indeed, it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. See *Shively* v. *Bowlby*, 152 U.S. 1, 47-48 (1894). Rather, the question

is whether the United States intended to convey title to the riverbed to petitioners. [Citations omitted].

"Turning then to that question, we think it clear, as did the court of appeals, that the parties to the treaties and patents did not pause specifically to provide for the ownership of the riverbed." (Appendix E-13-14)

The ultimate holding of the opinion of the Supreme Court is as follows:

"We thus conclude that the United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River within the present State of Oklahoma in the grants it made to petitioners. The judgments of the court of appeals are therefore reversed, and the cases are remanded for further proceedings consistent with this opinion." (Appendix E-15)

The petitioner submits to this Honorable Court that the district court and the Court of Appeals for the Tenth Circuit misapplied and misconstrued the holding of the Supreme Court in the case of *Choctaw Nation* v. *Oklahoma, supra*. Further, even though the Tenth Circuit Court of Appeals ruled in the alternative and held that the claims of the State of Oklahoma must be rejected on the merits, it can hardly be said that this was an unfettered or unrestrained decision in view of the fact that the Tenth Circuit had already stated that it felt the question had been answered in the negative by the Supreme Court in the case of *Choctaw Nation* v. *Oklahoma*.

CONCLUSION

The rights of many private citizens and governmental entities, in this litigation and other litigation now pending or to be filed, turns upon a definitive and final answer from the Supreme Court in regard to the question of whether the fee simple title to the bed of the Arkansas River was granted to the Cherokees and Choctaws in the capacity of a sovereign, or whether it was granted to them for purely private purposes.

If ownership of the lands underlying the navigable Arkansas River were granted to the Cherokees and Choctaws in a *sovereign capacity*, then ownership reverted to the United States, as sovereign, prior to Oklahoma statehood, by reason of the extinguishment of the Indian nations' sovereignty or powers of government by the several Acts of Congress prior to and including 1906. Oklahoma succeeded, as sovereign, to the ownership of the lands underlying the navigable rivers within its boundaries, from the United States, when it became a state on November 16, 1907.

If ownership of the lands underlying the navigable Arkansas River were granted to the Cherokees and Choctaws for *purely private purposes*, then the extension of their tribal existence by Congress was sufficient to enable them to retain ownership of the riverbed. Otherwise, their title would have reverted or escheated to the United States by reason of the qualifications contained in the patents made to them by the United States, which provided, "That the lands hereby granted shall revert to the United States, if said Cherokee Nation becomes extinct, or abandons the

same," and "unto the said Choctaw Nation . . . to have and to hold the same . . . while they shall exist as a nation and live on it. . . ."

The extension of tribal existence for the limited purpose of allotting lands to individual members of the tribes, and for the winding up of the tribes' affairs in general, had no effect on ownership of lands which had been held by the tribes in a sovereign capacity.

The Tenth Circuit Court of Appeals erred in holding that the Supreme Court resolved all these issues in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620. That decision was limited to the narrow issue of whether the treaty grants from the United States conveyed title to the bed of the Arkansas River to the Cherokee and Choctaw Nations under the treaties of 1830 and 1835, and the patents issued pursuant thereto.

The Tenth Circuit Court of Appeals erred in holding that, "The question is not whether the Indians have sovereignty but whether the tribes are still in existence and capable of land ownership." That conclusion would be true if the grants to the Indians were made to them *for purely private purposes* and not in the capacity of a sovereign.

However, the Tenth Circuit Court of Appeals did *not* answer the question of whether the grants of 1830 and 1835 were made to the Indians in a sovereign capacity, or whether the grants were made to the Indians for purely private purposes. The Tenth Circuit Court of Appeals did specifically hold that whatever sovereignty the Indians had was eliminated by the several Acts of Congress enacted prior to the date of Oklahoma statehood.

The grants made by the United States to the Cherokees and Choctaws were made to them in their sovereign capacity. The language of the decision in *Choctaw Nation* v. *Oklahoma, supra,* establishes that the Cherokees and Choctaws were, "[I]n many respects . . . promised virtually complete sovereignty over their new lands," and that they "had been long considered sovereign entities . . .", and that the grants to them "were undoubtedly to them as 'a political society.'" Also, in 1830 and 1835 the Cherokees and Choctaws ". . . were indeed constituted as the sovereign autonomy established in lieu of a prospective state." 397 U.S. at pages 635, 631-632, Note 8, and 638.

Congress did not "pause specifically" in the treaties and patents entered into in the 1830's and 1840's to provide for the ownership of the riverbed. 397 U.S. at page 634.

Neither did Congress "pause specifically" in the 1890's and early 1900's to expressly provide for the relinquishment of the ownership of the riverbed. However, in the 1890's and early 1900's Congress did take great pains to extinguish the "national or tribal title" and completely do away with the Indians' governmental powers (or "sovereignty") by the passage of several Acts. (Appendix A-6-7)

It must be assumed that Congress was aware of the general law, existing at that time, which provided that ownership of lands underlying navigable waters is an attribute of sovereignty and follows the transfer of sovereignty. *Martin* v. *Waddell,* 16 Pet. 367, 10 L.Ed. 997 (1837).

There is evidence that Congress followed the general law, existing at that time, and assumed that ownership of lands underlying navigable waters would follow the transfer of sovereignty. Congress made detailed provisions in Section 25 of the Act of April 26, 1906, 34 Stat. 137, for the payment of damages for the location of dams on *non-navigable* streams on lands belonging to the Indians, but made no provisions whatsoever for damages to the Indians incurred by reason of the taking of lands underlying navigable waters.

Further evidence of the fact that Congress followed the general law regarding the transfer of sovereignty is established by the Senate debates over H.R. 5976 (later enacted as Act of April 26, 1906, 34 Stat. 137), which provided for the extension of tribal existence to enable the Indians to wind up their allotments and affairs in general. These debates concerned themselves solely with land which the Indians were capable of holding by reason of mere tribal existence. No mention is made or questions raised concerning lands which the Indians were capable of holding only as a sovereign.

Petitioner contends that the actions of the Tenth Circuit Court of Appeals, in holding as set out above, creates a conflict between its holding and the extent and nature of the holdings of the Supreme Court in *Choctaw Nation* v. *Oklahoma, supra.*

WHEREFORE, premises considered, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit en-

tered in the above captioned case on June 1, 1972, in Causes No. 71-1210 and 71-1295 in 'hat court.

Respectfully submitted,

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Counsel for Petitioner

September, 1972

APPENDICES

APPENDIX A

THE CHEROKEE NATION, etc., Plaintiffs-Appellees, v. THE STATE OF OKLAHOMA, et al., Defendants, THE CHOCTAW NATION and THE CHICKASAW NATION, Intervenors-Appellants.	)	No. 71-1210
THE CHEROKEE NATION, etc., Plaintiffs-Appellees, v. THE STATE OF OKLAHOMA, et al., Defendants-Appellants, THE CHOCTAW NATION and THE CHICKASAW NATION, Intervenors-Appellants.	)	No. 71-1295

United States Court of Appeals, Tenth Circuit.
June 1, 1972.

Rehearings Denied June 27, 1972.

Action by Indian tribes against state of Oklahoma and holders of various mineral leases for an accounting and injunction against use of the bed of Arkansas river, wherein the state counterclaimed for a decree quieting title. A judgment of the Eastern District of Oklahoma, Edwin Langley, Chief Judge, was affirmed by the Court of Appeals, Breitenstein, Circuit Judge, 402 F.2d 739, and the Supreme Court, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615, reversed and remanded. From a judgment of the United

States District Court for the Eastern District of Oklahoma on remand, Edwin Langley, Chief Judge, appeals were taken. The Court of Appeals, Breitenstein, Circuit Judge, held, inter alia, that where Indian tribe sued for accounting of money received under Oklahoma leases, for future rentals or royalties, and for injunction against interference with use of the bed of stream, Oklahoma and its lessees denied the Indians' claims, and without claim of present ownership there was no case or controversy within federal court's jurisdiction, and a fair reading of all options of the Supreme Court required conclusion that Supreme Court decided present ownership to be in the tribe, the question of ownership, both past and present, was decided in the favor of Indians by the Supreme Court and could not be relitigated, and that the federal courts had no jurisdiction to adjudicate conflicting claims of Indian tribes in absence of congressional authorization waiving immunity and consenting to suit.

Affirmed in part and reversed in part and remanded.

Lon Kile for the appellants in No. 71-1210 and for the appellants The Choctaw Nation and The Chickasaw Nation in No. 71-1295.

S. M. Groom, Jr., and Odie Nance for the appellants in No. 71-1295 other than The Choctaw Nation and The Chickasaw Nation (with them on the briefs were Larry Derryberry, Attorney General of Oklahoma, for The State of Oklahoma; N. A. Gibson and James E. Slater for Commissioners of the Land Office; Jay R. Bond of Ross, Holtzendorff & Bond for Eason Oil Company; Frederick Dorwart of Holliman, Langholz & Runnels and W. Douglas Weisbruch for Lone Star Producing Company; Riley B. Fell and David O. Cordell for Marathon Oil Company; Sam C. Oliver for Skelly Oil Company; Luther Hudson of Hudson, Keltner, Smith & Cunningham for Southland Royalty Company; Robert W. Richards for Mobil Oil Corporation; Var-

ley Taylor and Robert L. Norris for Humble Oil & Refining Company; Millard F. Carr for Tenneco Oil Company; H. B. Watson of Walker and Watson for Tenneco Oil Company and Union Oil Company of California; and Roy Z. Johnson for Cities Service Oil Company).

Earl Boyd Pierce and Andrew Wilcoxen for The Cherokee Nation, appellee in both No. 71-1210 and No. 71-1295 (with them on the brief were Paul M. Niebell, Michael S. Yaroschuk, and Joe Muskrat).

John D. Helm for The United States, Amicus Curiae, in both No. 71-1210 and No. 71-1295 (with him on the brief were Shiro Kashiwa, Assistant Attorney General, and Edmund B. Clark and Robert S. Lynch, Attorneys, Department of Justice, and Richard A. Pyle, United States Attorney.

Before LEWIS, Chief Judge, and BREITENSTEIN and McWILLIAMS, Circuit Judges.

BREITENSTEIN, Circuit Judge.

We have again the three-pronged controversy over ownership of the bed of the Arkansas River, a navigable stream, in Oklahoma. When the case was first here we affirmed the district court holding that title was in Oklahoma, Cherokee Nation v. Oklahoma, 10 Cir., 402 F.2d 739. The Supreme Court reversed sub nom. Choctaw Nation v. Oklahoma, 397 U.S. 620. The case was remanded to the district court for further proceedings consistent with the opinion of the Supreme Court.

Cherokee Nation brought the action, claiming title to the entire bed of the stream between the Grand River and the Canadian River and to the northerly one-half of the bed between the Canadian and the state border, and asking for an accounting and injunction. Oklahoma answered pray-

ing that title be quieted in it. Various lessees of Oklahoma also answered setting forth their lease claims and denying the claim of the Cherokees. The Choctaw Nation and the Chickasaw Nation, herein referred to as the Choctaws, see 402 F.2d 739, 742, n. 2, intervened claiming ownership of the entire bed between the Canadian and the state border, and asking that title to that portion be quieted in them. That portion of the bed between the Grand and the Canadian is in dispute only between the Cherokees and Oklahoma.

The district court interpreted the Supreme Court opinion as conclusively denying the Oklahoma claim. It held that subject to the dominant power of the United States over navigation and to possible avulsive changes, the Cherokees owned the entire bed between the Grand and the Canadian and, between the Canadian and state border, they owned that part of the bed lying north of the main channel. The Choctaws were held to own that portion of the bed lying south of the main channel between the Canadian and the state border. It required Oklahoma to account for all money received by it from its lessees and to deposit the amount thereof into the registry of the court. The lessees were to account for, and deposit into the court registry, all money held by them in suspense and owing to Oklahoma under their leases. The leases were cancelled. It appears without contest that the oil and gas leases all cover land lying between the Canadian and the state border. The money to be deposited was to be divided equally between the Cherokees and the Choctaws.

Oklahoma and its lessees have appealed in No. 71-1295 from that portion of the judgment denying their claims and ordering accounting. In these respects we affirm the district court. The Choctaws have appealed in No. 71-1210 from that portion of the judgment denying their claim to the north portion of the bed between the Canadian and the state border and requiring the payment to them of only one-half of the money to be deposited with the court. We

believe that we have no jurisdiction over the controversy between the Cherokees and the Choctaws and accordingly conclude that the judgment must be reversed to the extent that it determines the conflicting claims of the two tribes.

I

Oklahoma and its lessees argue that the Supreme Court did not confirm present title to the river bed in the Indians but decided only that they received ownership under the grants and treaties of 1830 and 1835. Hence, they say that the question of present ownership is still open. We do not agree.

Present ownership has been at stake since the inception of the suit. The Cherokees sued for an accounting for money received under the Oklahoma leases, for future rentals or royalties, and for an injunction against interference with the use of the bed. Without present ownership, they could not be entitled to the relief sought. Oklahoma and its lessees denied the claims of the Indians. The fact that the arguments in the court of appeals and in the Supreme Court centered around the construction and effect of grants and treaties did not remove the question of present ownership. Unless present ownership was at stake, the opinions of both the court of appeals and the Supreme Court were futile, academic exercises. If the Indians had divested themselves of ownership, a determination of past ownership was valueless so far as the presented issues were concerned. Without a claim of present ownership, there was no case or controversy within the meaning of Art. III, § 2, of the United States Constitution. Federal courts decide only cases and controversies. Muskrat v. United States, 219 U.S. 346, 361. The Supreme Court does not decide "abstract, hypothetical or contingent questions." Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 284.

A fair reading of the opinions, majority, concurring, and dissenting, of the Supreme Court, requires the con-

clusion that the Supreme Court decided present ownership. See 397 U.S. at 621, 638-639, and 643. The mandate to the district court was for further proceedings consistent with the Supreme Court decision. The opinion of the Court may be consulted to ascertain the intent of the mandate. In re Sanford Fork and Tool Company, 160 U.S. 247, 256. The Supreme Court decision is the law of the case. Banco Nacional de Cuba v. Farr, 2 Cir., 383 F.2d 166, 177-178 and cases there cited, cert. denied 390 U.S. 956. The rule that a lower court must follow the decision of a higher court at an earlier stage of the case applies to everything decided "either expressly or by necessary implication." Munro v. Post, 2 Cir., 102 F.2d 686, 688; see also The Santa Maria, 10 Wheat. 431, 442-445, and Briggs v. Pennsylvania Railroad Co., 334 U.S. 304, 306. We believe that the question of ownership, both past and present, was decided in favor of the Indians by the Supreme Court and may not now be relitigated.

If we are wrong in what we believe to be the fair import of the Supreme Court decision, consideration must be given to claims now asserted by Oklahoma and its lessees. Divestiture is claimed on the ground that the Indians received title to the bed in their sovereign capacity as a public trust for the common benefit, that sovereignty was lost prior to Oklahoma's statehood, that the bed reverted to the United States, and that title passed to Oklahoma under the equal footing doctrine upon its admission to the Union in 1907.

Loss of sovereignty is said to have occurred by reason of the Act of March 3, 1893, 27 Stat. 612, 645, creating the Dawes Commission; the following negotiations for the extinguishment of tribal titles; the Act of June 28, 1898, 30 Stat. 495, 505, providing for the allotment of Choctaw lands; the agreement with the Choctaws for land allotment and the nullification of inconsistent treaties, Act of July 1, 1902, 32 Stat. 641; a similar agreement with the Cherokees,

Act of July 1, 1902, 32 Stat. 716; and the Act of April 26, 1906, 34 Stat. 137, which provides for the final disposition of the affairs of the Five Civilized Tribes.

The mentioned statutes did eliminate whatever sovereignty the Indians then had. However, we are not concerned with sovereignty, a political issue, with with land ownership. The question is not whether the Indians have sovereignty but whether the tribes are still in existence and capable of land ownership. We believe that this question is answered by the 1906 Act. Section 27 thereof provides that, upon dissolution of the tribes, lands belonging to them shall not become public lands nor the property of the United States but shall be held by the United States in trust for the Indians. 34 Stat. 148. Section 28 provides for the continuation of tribal existence and tribal government for all purposes authorized by law. Ibid.

The Supreme Court has said that "when Congress has once established a [Indian] reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." Seymour v. Superintendent, 368 U.S. 351, 359. There has been no separation here; the tribal governments still exist; and Oklahoma was admitted to the Union in 1907 upon compliance with the Enabling Act of June 16, 1906, 34 Stat. 267, which required a disclaimer of title to all lands owned "by any Indian or Indian Tribes." Ibid. at 279. We adhere to the conclusion, which was implicit in our first decision, that the Indians have not divested themselves of the land in question. The claims of Oklahoma and its lessees must be rejected.

II

The trial court cancelled all leases given by Oklahoma to the river bed, ordered an accounting for all lease rentals, bonuses, and royalty payments and the payment of the amount so received by Oklahoma into the court registry, and held that the lessees were not entitled to the return of

anything paid to Oklahoma under the leases. No problem arises over the lease cancellations because Oklahoma did not own the land and could not lease it. Oklahoma and its lessees contend that damages should have been limited to those recoverable in a trespass action. The lessees say that they are entitled to repayment of the sums paid to Oklahoma.

The trial court pointed out that the Indians had owned the bed for about 140 years without doing anything about it, that Oklahoma for almost 63 years had acted under the belief that it owned the bed, and that, because of river meandering, natural avulsions and accretions, and the recent channelization of the river, ascertainment of the changing boundaries of the bed was difficult. The court rejected the then claim of the Choctaws that they were entitled to the value of the minerals taken. It ordered that the leases be cancelled, and that Oklahoma and its lessees account and pay into the registry all sums received as lease bonuses, rentals, and royalties.

On this appeal the Choctaws withdraw their claim to mineral value and instead join the Cherokees in supporting the actions of the trial court. Oklahoma and its lessees now take the position that, if Oklahoma title fails, the Indians can recover only those damages allowable in a trespass action, stated otherwise, the mineral value, surface damage, and loss of use. They accept the lease cancellation if Oklahoma title fails.

We believe that the trial court reached the fairest and best result possible in a difficult situation. The action is essentially one to quiet title and, hence, of equitable cognizance. See Caywood v. January, Okl., 455 P.2d 49, 52. Upon invocation of equitable jurisdiction the court may go beyond matters underlying that jurisdiction and give whatever relief may be necessary in the circumstances. "Only in that way can equity do complete rather than truncated justice." Porter v. Warner Holding Co., 328 U.S. 395, 398.

Oklahoma and its lessees say that the award of the lease considerations to the Indians is contrary to controlling Oklahoma law. Without exploring whether Oklahoma law controls damages in a federal equity action, we are convinced that Oklahoma law sustains the trial court. Reliance on Bowman v. Towery, Okl., 248 P.2d 1030, is misplaced. That was a quiet title action in which an intervenor sought recovery of a lease bonus from one who in good faith thought he was the owner and had leased the property. The court held that the claim for the bonus could not be heard because it was a new and distinctive cause of action, not germane to the suit and not within the scope of the bill. Ibid. at 1036-1037. In the case at bar accounting has been in the action from the beginning.

Whatever persuasiveness Bowman v. Towery might once have had is nullified by the later decision in Allison v. Allen, Okl., 326 P.2d 1059. In that case a cross-petition asked for an accounting in a quiet title action. The record owner, not the real owner, gave an oil and gas lease and received a bonus. The trial court gave the real owner judgment for royalties received but denied his claim to the lease bonus. On this point the Oklahoma Supreme Court reversed saying that as to the bonus, the record owner was the constructive trustee for the real owner who was entitled thereto. Ibid. at 1062. The effort to distinguish Allison v. Allen from the case at bar on the ground that in Allison the lessor was the record owner whereas here the lessor was only the ostensible owner does not impress us. In each case the lease considerations were received by one not entitled to them.

The decision, now acquiesced in by the Indians, that they were not entitled to trespass damages left the court with three alternatives, (1) to permit Oklahoma to retain the lease considerations, (2) to require Oklahoma to return those considerations to the lessees, or (3) to award the lease considerations to the Indians as the true owners of the leased land. The first merits little consideration. Okla-

homa received money for leasing land which it did not own. To permit it to retain such money would approve unjust enrichment contrary to well recognized principles of equity. See Blake Construction Co. v. American Vocational Association, Inc., D.C. Cir., 419 F.2d 308, 311, and Doing v. Riley, 5 Cir., 176 F.2d 449, 457-459. The suggestions of Oklahoma that laches of the Indians precludes their recovery does not impress us. The unexplained delay in title determination was mutual. The record contains nothing to show that any action, or nonaction, of the Indians disadvantaged Oklahoma. Oklahoma has suffered, and will suffer, no detriment other than payment to the rightful owners of the money which it wrongfully received as lessor.

In our opinion Oklahoma has no right to retain the lease considerations. The right thereto lies between the lessees and the Indians. The lessees and Oklahoma made a mutual mistake of law. The documents determinative of title were all a matter of public record. We find nothing to suggest that Oklahoma engaged in conduct which misled or prejudiced the lessees. The trial court found, and we perceive nothing in the record to dispute the finding, that the lessees "got what they bargained for." The court decree protects the lessees against accountability to the Indians for actions taken under the leases. This includes damages for trespass. The lessees are not entitled to this protection plus return of the money which they paid for the leases.

Whatever might be the situation if we were concerned only with the respective rights of Oklahoma and its lessees, we are confronted with the fact that the lessees have had the use of the land and have paid Oklahoma, not the rightful owner, therefor. If the lessees were awarded the return of the lease considerations which they have paid to Oklahoma, they would have received the use of the land for nothing and by the decree would be protected against trespass claims by the real owners. Equity will not condone

such a result. The lessees are not entitled to return of the lease considerations.

This leaves us with the third alternative, accounting to the Indians for the lease considerations. No party questions the amounts of bonuses, rentals, and royalties. There is no claim that they were either exorbitant or inadequate. For all that the record shows, they were at the going rates for such leases. We perceive no reason why the Indians should not be entitled thereto. The findings and decree of the chancellor are presumptively correct, and unless a serious mistake has been made in the consideration of the evidence or an obvious error has intervened in the application of the law, the decree shall be permitted to stand. Peoples Trust & Savings Bank v. Hubbell, 10 Cir., 102 F.2d 754, 756-757. We find no mistakes of fact or law. The decree is not clearly erroneous. We believe that it properly and satisfactorily disposes of a troublesome problem.

III

Both the Choctaws and the Cherokees claim ownership of that portion of the bed lying northerly of the main channel between the Canadian and the state border. On the first round of the case, neither the district court, the court of appeals, nor the Supreme Court decided this issue. See 402 F.2d at 742, and 397 U.S. at 630, n. 7. After remand, the district court held that title was in the Cherokees and the Choctaws have appealed.

The problem is the jurisdiction of the federal courts to determine a boundary dispute between Indian tribes without congressional action waiving immunity and consenting to suit. Although neither the Cherokees nor the Choctaws question jurisdiction, the existence of jurisdiction is of dominant concern to the courts, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189, and cannot be conferred by consent, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18.

The pleadings must be considered. The Cherokees sued Oklahoma and its lessees for an accounting and injunction. The defendants denied those claims and asked that title be quieted in them. Thereafter, the Choctaws asserted ownership in part of the bed, and asked that title be quieted in them. Although the record contains no pleading responsive to the intervention, throughout the litigation the Cherokees have contested the Choctaw claim.

We deem it unnecessary to explore the intricacies of quiet title law. Resolution of the issues requires a determination of the respective rights of the claimants to the bed. The right to damages depends on ownership. Unless ownership is determined, the court cannot divide the money derived from the accounting. The question is not resolved by the fact that the court had jurisdiction over the dispute between the Cherokees and Oklahoma. The interest of the Choctaws in part of the bed permits them to join with the Cherokees in resisting the Oklahoma claim but does not authorize them to litigate the boundary dispute.

Under § 27 of the 1906 Act, 34 Stat. 137, 148, the United States holds the land in trust for the Indians. The United States may not be sued without consent. United States v. Sherwood, 312 U.S. 584, 586. Neither may an Indian tribe. Turner v. United States, 248 U.S. 354, 358; Hamilton v. Nakai, 9 Cir., 453 F.2d 152, 158-159; and Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 8 Cir., 370 F.2d 529, 531-532.

Reliance on § 18, Act of April 26, 1906, 34 Stat. 137, 144, is of no avail. That statute allows defendants to assert any claim they may have against an Indian tribe after the tribe has brought suit against them in federal court in Indian Territory. This case was brought in the United States District Court for the District of Oklahoma. In any event the Cherokees, who brought the suit, did not sue the Choctaws. By their intervention the Choctaws attempted to assert a claim against the Cherokees.

In United States v. Shaw, 309 U.S. 495, the Supreme Court held that the United States, by filing a claim against an estate in state proceedings, did not subject itself to a binding, though not enforcible, ascertainment and allowance of a cross-claim against itself, in excess of set-off. Shaw distinguishes The Thelka, 266 U.S. 328, and subsequent decisions quoting its language. Ibid. at 502. In United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513, the Court extended the Shaw principle to an Indian tribe against which a cross-claim had been filed.

Although in the case at bar the problem does not arise by way of cross-claim, the principles announced in the last cited cases apply. On the northerly half of the channel between the Canadian and the state border, we have a three-cornered fight. The Cherokees and Choctaws both resisted the claims of Oklahoma and its lessees and have prevailed on that issue. The division of the accounting proceeds is in dispute between the Cherokees, who say they are entitled to one-half, and the Choctaws, who say they are entitled to the whole amount. The issue is in the lawsuit and cannot be avoided by the use of pleading labels. The result depends on ownership of the northerly half of the bed and that depends on the boundary between the two tribes. Neither tribe may directly sue the other to determine that boundary. What cannot be done directly, from a jurisdictional standpoint, cannot be done indirectly.

If the tribes, or either of them, want to have the common boundary, and hence land ownership, established they must secure congressional authorization for a suit by one against the other. This is the recognized procedure. See 72 Stat. 403, authorizing a quiet title suit between the Navajos and Hopis and referred to in Hamilton v. Nakai, supra, 453 F.2d at 155 and 158-159; see also 82 Stat. 15, granting consent to sue in a boundary dispute between the Navajos and the Ute Mountain Tribe. In our opinion the federal

courts have no jurisdiction to adjudicate the conflicting claims of the Cherokees and Choctaws in the absence of congressional authorization.

IV

The judgment is affirmed so far as it (1) denies the claims of Oklahoma and its lessees and (2) requires an accounting and payment by Oklahoma and its lessees into the registry of the court. The judgment is reversed in so far as it (1) determines the conflicting rights of the Cherokees and Choctaws and (2) requires an equal division of the accounting proceeds between them. The case is remanded for further proceedings consistent with this opinion. The attention of the parties is directed to the way in which a somewhat similar controversy involving a boundary dispute between the Navajos and members of the Ute Mountain Tribe and their respective rights to bonuses, rentals, and royalties was handled in the Act of February 14, 1968, 82 Stat. 15. In No. 71-1295 the costs are assessed against Oklahoma and its lessees. In No. 71-1210 the costs are assessed against the Choctaw Nation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
APR 14 1971
CHARLES H. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

CHEROKEE NATION OR TRIBE OF INDIANS, Plaintiff,	)	
v.	)	No. 6219
STATE OF OKLAHOMA, et al., Defendants,	)	
CHOCTAW NATION and the CHICKASAW NATION, Intervenors.	)	

JUDGMENT

In accordance with the mandate of the United States Court of Appeals, Tenth Circuit, and the pretrial orders heretofore entered in this case under dates of August 19, 1970, January 12, 1971, and April 14, 1971, determining all issues herein involved,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff, the Cherokee Nation or Tribe of Indians, is the owner of the entire bed of the Arkansas River between its high water banks from its confluence with the Grand River to its confluence with the Canadian River, subject only to the right of the United States of America to restore, maintain, and exercise dominion and control over navigation and to any rights that may now exist in

others as a result of avulsive changes in this portion of the river since distribution of the Cherokee lands to individuals.

2. From the confluence of the Canadian River with the Arkansas River to the Eastern Oklahoma line that part of the bed of the Arkansas River between its high water banks which lies north of the main channel is owned by the Cherokee Nation or Tribe of Indians and that part which lies south of the main channel is owned by the intervenors, the Choctaw and Chickasaw Nations, subject only to the rights of the United States of America heretofore stated with respect to navigation and the rights which may have accrued to others by reason of avulsive changes, if any, since the allotment of tribal lands.

3. The defendant the State of Oklahoma has no right, title or interest in or to any portion of the Arkansas River between its high water banks from its confluence with the Grand River to the Eastern Boundary of Oklahoma.

4. The remaining defendants have no right, title, or interest by reason of any leasehold or other agreement with the State of Oklahoma to any such portion of said river.

5. Neither the plaintiff nor the intervenors, the Cherokee Nation and the Choctaw and Chickasaw Nations, is entitled to an accounting for any oil, gas, or other minerals, including sand and gravel, or any interest therein, except lease rentals, bonus, and royalty payments, taken or acquired by any of the defendants under or by reason of lease agreements with the State of Oklahoma, and said defendants are not entitled to the return of any money paid to the State of Oklahoma for or in connection with such leases.

6. The defendant State of Oklahoma is required to account to the court for all money at any time received pursuant to or under such leases or agreements, and to

deposit such sums received or owing in the registry of the court within ninety days. Similarly, all other defendants are required to account for and deposit in the registry of the court all money held in suspense or owing by them under such leases or other agreements with the State of Oklahoma.

7. All leases and other agreements between the State of Oklahoma and the other defendants herein on and covering the property here involved which have not expired are hereby cancelled, set aside and held for naught.

8. When the accounting herein required has been made and approved, and the money deposited, the Clerk of this Court is authorized and directed to issue checks distributing one-half to the Cherokee Nation or Tribe of Indians and one-half to the Choctaw and Chickasaw Nations and deliver them to the respective counsel of record for such Nations.

IT IS FURTHER ORDERED that no costs be awarded to the plaintiff or intervenors.

The court is of the opinion that since this order disposes of all issues in the case (except those that may arise by reason of the accounting herein required), and involves controlling questions of law as to which there is substantial ground for difference of opinion, an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly,

IT IS FURTHER ORDERED that in the event of appeal proceedings in the case be stayed in this court pending disposition on appeal.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
JAN 12 1971
JOHN B. FINK
Clerk, U. S. District Court
By A B
Deputy Clerk

CHEROKEE NATION OR TRIBE OF INDIANS, Plaintiff,	)	
v.	)	No. 6219
STATE OF OKLAHOMA, et al., Defendants.	)	
CHOCTAW NATION and the CHICKASAW NATION, Intervenors.	)	

PRETRIAL ORDER

This cause is now before the court for decision on issues remaining for disposition as set out in the pretrial order entered August 19, 1970.

The first of these, whether the title and interest claims of the defendants are properly the subject of further proceedings in this court, depends upon whether they were disposed of by the United States Supreme Court in Choctaw Nation, et al., v. Oklahoma, et al., 397 U.S. 620. It is the opinion of this court that they were disposed of; that the decision of the Supreme Court precludes any finding here that prior to Oklahoma's admission to the Union ownership of the river bed was restored to the United States through loss by the Indian Nations of their status as governmental sovereigns, as contended by the defendants, or

that riparian allotments to individual Indians carried to the center of the stream and have been lost, within the high water banks, to the State of Oklahoma through adverse possession, the defendants' alternate position.

In holding in favor of the Indian tribes, the Supreme Court said at the outset of its opinion:

> "These cases involve a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake *is* the ownership of the minerals beneath the river bed and the dry land created by navigation projects that are narrowing and deepening in the river channel." (Emphasis supplied)

And Mr. Justice White began his dissent with the statement:

> "At issue in these cases *is* the ownership of land underlying the Arkansas River. . ." (Emphasis supplied)

It is apparent, therefore, that the Supreme Court viewed the problem before it as involving the question of present ownership.

Further, and even more emphatically foreclosing the defendants' claims, the grounds upon which they rely were considered by the Supreme Court and rejected, at least by implication. The court said:

> "Then, again due in large part to the pressure of settlers who were encroaching on Indian lands, Congress acted to change the arrangement. By the Act of March 3, 1893, 27 Stat. 645, a commission was created to negotiate with the Indian tribes that had been located in Oklahoma on the allotment of land to their individual members in preparation for the final dissolution of the tribes. Thereafter, the Indians—including the Choctaws, Chickasaws, and Cherokees—agreed to the allotment of their lands and the termination of

tribal affairs. See Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716. *Finally, Congress provided for the disposition of all petitioners' lands with the provision that any remaining tribal property 'be held in trust by the United States for the use and benefit of the Indians.'* Act. of April 26, 1906, c. 1876 § 27, 34 Stat. 148. *The way was thus paved for Oklahoma's admission to the Union 'on an equal footing with the original States,' conditioned on its disclaimer of all right and title to lands 'owned or held by an Indian, tribe, or nation.'* Act of June 16, 1906, c. 3335 §§ 3, 4, 34 Stat. 270, 271." (Emphasis supplied)

In holding the treaty grants included title to the river bed, and in resolving the title dispute in favor of the nations because of the grants, it is implicit in such decision that the Supreme Court also held the bed was not allotted to individual Indians and that title thereto passed to the United States in trust for the use and benefit of the Indians, and was disclaimed by the State of Oklahoma. Even if there were room for doubt about whether or not the river bed was allotted, Oklahoma's disclaimer would preclude subsequent assertion of title after admission to statehood. But any possible doubt was removed by Mr. Justice Douglas, who in his concurring opinion said:

"A commission was created to negotiate an agreement with these tribes superseding the earlier treaties, all as related in Choate v. Trapp, 224 U.S. 665, 667-670. An agreement was in time reached whereby tribal lands were allotted to individual members of the tribe, with any remaining tribal land passing to the United States as trustees for the Indians. 34 Stat. 137. *The bed of the Arkansas was not allotted.* The next year—1907—Oklahoma was admitted to the Union on an equal footing with the original states. 34 Stat. 267. Certainly this cession by the tribes of their interest in the river bed of the Arkansas to the United States in

trust for their members was no possible vehicle for transferring that title to Oklahoma." (Emphasis supplied)

And Mr. Justice White pointed out in his dissenting opinion that lands bordering on navigable streams stop at the stream, citing Railroad Company v. Schurmeir, 7 Wall. 272, 288-289—a proposition the majority of the court seems to have accepted without comment.

It is the opinion of this court, therefore, that all claims of the defendants to any right, title, or interest to the bed of the Arkansas River or in the oil, gas and other minerals underlying the bed from its confluence with the Grand River to the eastern boundary line of the State of Oklahoma, must be denied and excluded from further consideration in this proceedings in this court.

The second issue for disposition at this time under the previous pretrial order, the dispute between the Cherokee Nation or Tribe of Indians in Oklahoma and the Choctaw and Chickasaw Nations over ownership of the bed of that part of the Arkansas River which constitutes their common boundary, was specifically left unresolved by the Supreme Court for the reason that the question was not reached in the initial disposition of the case in this court. These parties have agreed that no evidence is required for resolution of their disagreement here; that their rights in the matter depend upon the legal effect of the treaties and patents by which they acquired their respective domains west. And from an examination of the applicable language of these documents this court has concluded there is no realistic basis for the dispute between them—that the dividing line between their respective tribal properties was fixed as the middle of the main channel of the Arkansas River. This conclusion is substantially supported by the reasoning of the Supreme Court in its decision adverse to the claims of ownership and other interests by the defendants. (Choctaw Nation v. Okla., supra)

Under the terms of a treaty with the Cherokees in 1817 the United States ceded certain lands to the tribe which were largely located in an area that later became a part of the State of Arkansas. A small part of the tract, however, extended over into what is now Oklahoma and this parcel had as its southern boundary the north bank of the Arkansas River. In the Treaty of Doaks Stand in 1820 the United States ceded to the Choctaws the southeast corner of an area which later became the State of Oklahoma, with the Arkansas River from the land of the Cherokees to the Canadian Fork as the pertinent northern boundary. This boundary was described in the treaty as "Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork." The description of the beginning point is inexact, since the Cherokee lands extended a considerable distance along the Arkansas, but it is reasonable to assume that what was meant was beginning at the Arkansas Territory western boundary (Arkansas became a territory on March 2, 1819), and that the north bank of the Arkansas was intended as the north boundary of the Choctaw lands. In 1828, by treaty with the United States, the Cherokees gave up their Arkansas lands in exchange for lands in the northeast corner of what is now Oklahoma, with the Arkansas River as the southern boundary of that part of the tract which lay between the Arkansas Territory line and the Canadian Fork—the stretch of the river which was the common boundary between the Cherokees on the north and the Choctaws on the south. In the treaty, this part of the boundary was described from the Canadian as "thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary line strikes said river." This same descriptive language was used in a further treaty with the Cherokees in 1833 and in the Treaty of New Echota with the Cherokees in 1835. The patent to the Cherokees issued in 1838 pursuant to the New Echota Treaty used the following language: "thence down the

main channel of the Arkansas River to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the land of the Choctaws on the south bank of the Arkansas River." (Arkansas became a state in 1836). It is the position of the Choctaw and Chickasaw Nations that when the treaties with the Cherokees were entered into in 1828, 1833, and 1835, and the patent was issued in 1838, the United States had already, in 1820, ceded the entire bed of this portion of the Arkansas to the Choctaws and was in no position to give or trade any part of it to the Cherokees. But in 1830, by the Treaty of Dancing Rabbit Creek between the United States and the Choctaws, a new and different description of the northern boundary of the Choctaws was agreed upon. This treaty reads: "beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork. . . ." Since the Choctaw Nation was a sovereign body politic at the time, legally capable of contracting with the United States, certainly it had the capability of agreeing to a different northern boundary for its lands even though this resulted in surrendering lands—in this case the north half of the Arkansas River—which may have been previously acquired the same way, by treaty. This view of the matter was obviously taken by the Supreme Court in considering this case on certiorari when it stated in its opinion that the Treaty of Doaks Stand "was superseded by the Treaty of Dancing Rabbit Creek." Also, in the same opinion, after discussing some of the Indian removal problems, the Supreme Court said:

> "The United States thus succeeded in its efforts to remove the Indians from their eastern lands. In exchange, by the *Treaty of Dancing Rabbit Creek* with the Choctaws in 1830 and the *Treaty of New Echota* with the Cherokees in 1835, the United States granted a vast area of its western territory to the two Indian nations." (Emphasis supplied)

There is no merit, therefore, to the argument of the Choctaws that in 1835 the United States was not in a position to cede the north half of the Arkansas River to the Cherokees—unless, of course, the descriptive language used in the Dancing Rabbit Creek Treaty is to be construed as meaning the north bank of the river rather than the middle. The Choctaws do not rely on any such construction, as indeed they should not, since with equal reasonableness the language could be construed as meaning the south bank. As a matter of fact, it was the State of Oklahoma's contention before the Supreme Court that in the Treaty of Dancing Rabbit Creek the language should be construed to mean the south bank and in the Treaty of New Echota to mean the north bank. And this contention was rejected.

It is the holding of this court, therefore, that from the confluence of the Canadian River with the Arkansas River to the eastern Oklahoma line, that part of the bed of the Arkansas River between its high water banks which lies north of the main channel belongs to the Cherokee Nation and that part which lies south of the main channel belongs to the Choctaw and Chickasaw Nations, subject, however, to the rights thereto which may have accrued to others by avulsive changes in the river, if any, since the distribution of the tribal lands to individuals.

It is the further holding of this court, consistent with the decision of the Supreme Court, that the entire bed of the Arkansas River between its high water banks from its confluence with the Grand River to its confluence with the Canadian River belongs to the Cherokee Nation, subject to any rights that may now exist in others as the result of avulsive changes in this portion of the river since distribution of the Cherokee lands to individuals.

There remains for pretrial disposition in this case the issues set out in paragraphs 2, 3 and 7 of the pretrial order entered August 19, 1970. For the purpose of considering these issues, this case is set for further pretrial conference

at 9:30 a.m. on February 5, 1971, at which time the parties will be prepared to present their respective positions as to these remaining issues on oral arguement. Briefs will not be required prior to the conference.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
AUG 15 1970
JOHN B. FINK
Clerk, U. S. District Court
By ----------
Deputy Clerk

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, Plaintiff,	)	
v.	)	No. 6219
STATE OF OKLAHOMA, et al., Defendants,	)	

PRETRIAL ORDER

Judgment was entered in this case on November 15, 1967, in favor of the defendants and against the plaintiff and intervenor, quieting title in the State of Oklahoma, and in all defendants claiming an interest through the State, to the bed of the Arkansas River from its confluence with the Grand River to the boundary between the States of Oklahoma and Arkansas. The basis for the decision, as set out in the pretrial orders of September 25, and October 10, 1967, was that no treaty or patent had the effect of conveying the navigable portion of the Arkansas River either to the Cherokee Nation or to the Choctaw Nation and ownership of the bed passed to the State of Oklahoma upon admission to the Union on November 16, 1907. On appeal, the judgment was reversed by the Supreme Court of the United States and subsequently, by order entered July 24, 1970, the case was remanded by the United States Court of Appeals for the Tenth Circuit to this court for determina-

tion of unresolved issues and for further proceedings consistent with the decision of the United States Supreme Court.

In compliance with the mandate of the Court of Appeals, a pretrial conference was held on August 14, 1970, for the purpose of determining what issues were unresolved and what further proceedings were required, and to consider any other matters deemed pertinent for final disposition of the claims of the parties. The plaintiff, The Cherokee Nation, and the intervenor, The Choctaw and Chickasaw Nations, appeared by their respective counsel of record. The defendants appeared by their attorneys of record or by attorneys representing defendants with similar interests. Robert G. Carter appeared by Alpheus Varner as amicus curiae and the United States of America appeared by the United States Attorney for this district but announced that it would not appear further in the case, as amicus or otherwise.

At the conclusion of the conference, after full discussion with counsel, the court determined the issues remaining for decision to be as set out below.

1. It is the position of the Indian Nations that the effect of the decision of the Supreme Court is to fix title to the river bed in either the plaintiff or the intervenor, or both, from the dates of the patents to the present time, leaving unresolved with respect thereto only the question of ownership, between the tribes, of that portion of the river which constitutes the Nations' boundaries. Each Nation claims title to the entire bed of the river. Amicus Carter contends that when the tribes became owners of the river bed they became owners as tenants in common, and further, that by reason of an Act of Congress passed in 1926 they and tribal members to whom the land was allotted in severalty, became subject to losing title thereto by adverse possession.

2. The Cherokee Nation's further position is that the defendants should be required to file an accounting for all moneys received or suspended in connection with leases executed, and for oil, gas, and other minerals, including sand and gravel, produced, on or from the river bed claimed by the tribes, and that all such moneys heretofore received or placed in suspense, or becoming due in the future, should be paid into the registry of the court for distribution as the court shall determine.

3. The Choctaw and Chickasaw Nations take the position that all minerals, including sand and gravel, taken by any of the defendants from the bed of the Arkansas River were wrongfully taken and that such defendants should be required to reimburse them for the full value of any such takings. This position will require an amendment to the complaint in intervention to enlarge the issues raised by the original intervening complaint.

4. The defendants' position, in which all join, including amicus Carter, is that the Act of April 26, 1906 (34 Stat. 137) restored the ownership of the entire navigable portion of the river bed in the United States, since the tribes were required under the law to hold in trust for the public all navigable waters within their respective domains. This act, the defendants claim, deprived both tribes of their status as governmental sovereigns and in the absence of such status they were no longer capable of holding the navigable waters in trust, resulting as a consequence in the reverting of ownership to the United States, and subsequently, in the transfer of ownership to the State of Oklahoma.

5. The defendants' second or alternative position is that riparian allotments by the tribes carried with them whatever portion of the river bed was owned by the allotting tribe, and upon such land being allotted to individual Indians it became subject to adverse possession, and has been so lost through claim of ownership by the State of

Oklahoma. All defendants accept the possibility that where land along the navigable portion of the river was not allotted and remained in the hands of the tribe it may not have been subject to being lost by prescription, contrary to amicus Carter's contention. Except in this respect, amicus Carter joins defendants in their second or alternate position.

6. All defendants take the general position that title to all or virtually all of the navigable portion of the river bed has been acquired by the State of Oklahoma either by reason of the Act of April 26, 1906, or by prescription against individual Indians and their successors in interest after the allotment of the tribal lands to the members of the tribes.

7. The State of Oklahoma and all other defendants take the further view that if the State was not in fact the owner of the lands leased, lease bonus money royalties, and delay rentals should be returned to the defendants making such payments rather than distributed to the tribes.

It was agreed by all parties, with the court concurring, that of first priority was the determination of the respective claims of the parties to the river bed in the navigable portion of the river. It was further agreed that of second priority was the determination of the issues between the tribes, in the event of a decision favorable to them respecting title, and that all other issues should be held in abeyance pending disposition of these issues. Finally, it was agreed that neither the question of title as between the tribes and the defendants nor the question between the tribes as to title depend upon the consideration of any evidence by the court, both matters involving only questions of law.

IT IS THEREFORE ORDERED that the defendants shall have until September 14, 1970, to submit briefs directed to their alternate claims to the river bed of the

navigable portion of the Arkansas River in Oklahoma and the plaintiff and the intervenor shall have until October 1, 1970, to file responses thereto.

IT IS FURTHER ORDERED, at the request of the plaintiff and intervenor, that they shall have until October 16, 1970, to submit simultaneous briefs addressed to their respective claims to the river bed against each other and until October 26 to file reply briefs.

AND IT IS FURTHER ORDERED that amicus Carter shall have a like time in which to file briefs in support of his contentions.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX E

CHOCTAW NATION ET AL. *v.* OKLAHOMA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 41. Argued October 22-23, 1969—
Reargued March 5, 1970—
Decided April 27, 1970*

Under various treaties (including the Treaty of Dancing Rabbit Creek in 1830 between the United States and the Choctaws and the Treaty of New Echota in 1835 between the United States and the Cherokees) and patents issued thereunder, petitioner Indian Nations are *held*, contrary to the claims of the State of Oklahoma and other respondents, to have received title to the land underlying the navigable portion of the Arkansas River from its confluence with the Grand River in Oklahoma to the Oklahoma-Arkansas border. Pp. 628-636.

402 F. 2d 739, reversed and remanded.

Lon Kile argued the cause for petitioners in No. 41 on the original argument and on the reargument. With him on the briefs was *J. D. McLaughlin*. *Peyton Ford* argued the cause for petitioner in No. 59 on the original argument and on the reargument. With him on the briefs were *Michael S. Yaroschuk*, *Andrew C. Wilcoxen*, *Earl Boyd Pierce*, and *Paul M. Niebell*.

M. Darwin Kirk and *G. T. Blankenship*, Attorney General of Oklahoma, argued the cause for respondents in both cases on the reargument. *Mr. Kirk* argued the cause for respondents in both cases on the original argument.

*Together with No. 59, *Cherokee Nation or Tribe of Indians in Oklahoma* v. *Oklahoma et al.*, also on petition for writ of certiorari to the same court.

With them on the brief were *David O. Cordell, Riley B. Fell, Julien B. Fite, N. A. Gibson, S. M. Groom, Jr., Oscar L. Hasty, William P. McClure, Heartsill Ragon, Robert W. Richards, Varley H. Taylor, S. W. Wells,* and *Judson S. Woodruff.*

Opinion of the Court

Louis F. Claiborne argued the cause for the United States as *amicus curiae* urging reversal in both cases on the original argument and on the reargument. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Kashiwa, Roger P. Marquis,* and *Frank B. Friedman.*

Charles A. Hobbs filed a brief for Wilkinson, Cragun & Barker as *amicus curiae* urging reversal in both cases.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases involve a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake is the ownership of the minerals beneath the river bed and of the dry land created by navigation projects that are narrowing and deepening the river channel.

In December 1966, petitioner Cherokee Nation brought suit in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and various corporations to which the State had leased oil and gas and other mineral rights. In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had been since 1835 the absolute fee owner of certain land below the mean high water level of the Arkansas River. Subsequently, petitioners Choctaw and Chickasaw Nations sought and were

granted leave to intervene in the case in order to present their claims that part of the river bed belongs to them.

After pre-trial proceedings in the District Court, a judgment on the pleadings was entered against petitioners and in favor of the State. The District Court held that land grants made to petitioners by the United States conveyed no rights to the bed of the navigable portion of the Arkansas River. The court thus held that title to the river bed remained in the United States until 1907, when it passed to the State upon Oklahoma's admission to the Union. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court. 402 F. 2d 739 (1968). We granted certiorari, 394 U. S. 972 (1969), to consider petitioners' claims that they received title to the land in question by treaties with the United States in 1830 and 1835.

I

At the outset, we note that these cases require us to pass upon the effect of treaties that were entered into nearly a century and a half ago. As background, it is necessary briefly to relate the circumstances by which petitioners received large grants of land by treaty from the United States.

The history behind these treaties goes back at least to the period immediately after the Revolutionary War and prior to the adoption of the Constitution—a time when petitioners and other Indian Nations occupied much of what are today the southern and southeastern parts of the United States. In 1785, in the Treaty of Hopewell, November 28, 1785, 7 Stat. 18, the United States entered into a treaty of peace and friendship with the Cherokee Indians which established the boundaries of the Cherokee Nation and in which the Indians acknowledged themselves to be under the protection of the United States. The next year, a similar treaty was concluded between the Choctaws and the United States. Treaty of Hopewell, January 3, 1786, 7 Stat. 21.

In following years, the United States entered into a number of additional treaties with both the Cherokees and Choctaws.[1] By means of these treaties, the United States purchased large areas of land from the Indians to provide room for the increasing numbers of new settlers who were encroaching upon Indian lands during their westward migrations. Although the Indians were not considered to own the fee title to the land on which they lived, they did have the right to the exclusive use and occupancy of the land—a right that could be ceded only to the United States.[2] Moreover, the Indians continued to live on the land not ceded under their own laws and way of life, and their rights to those lands were "solemnly" guaranteed by the United States. Treaty of Holston, July 2, 1791, 7 Stat. 39, 40; see Indian Intercourse Act of 1802, 2 Stat. 139.

Even while it was making this solemn guarantee, however, the United States adopted a policy aimed at completely extinguishing these Indian Nations' rights to their native lands. The United States had acquired a large western territory in 1803 by the Louisiana Purchase, and it was soon proposed that the Indians be relocated on new lands west of the Mississippi.[3] For a time, it seemed that the westward removal of the Indians might be readily accomplished. In the Treaty of July 8, 1817, 7 Stat. 156, the Cherokee Nation agreed to trade part of its lands in Georgia for a large amount of land in the Arkansas Territory. See also Treaty of February 27, 1819, 7 Stat. 195. Thereafter, a number of the Cherokees left their eastern lands and traveled

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[1]*E. g.*, Treaty of October 2, 1798, 7 Stat. 62; Treaty of December 17, 1801, 7 Stat. 66; Treaty of October 25, 1805, 7 Stat. 93.

[2]See *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823); *Fletcher* v. *Peck*, 6 Cranch 87, 142-143 (1810).

[3]See Act of March 26, 1804, § 15, 2 Stat. 289. In 1802, even before it had acquired new lands west of the Mississippi, "the United States agreed to extinguish Indian title within the limits of the States as soon as it could be done 'peaceable [sic] and on reasonable terms.'" U. S. Interior Dept., Federal Indian Law 180-181 (1958).

west. Three years later, in the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, the Choctaw Nation agreed to exchange approximately half of its remaining Mississippi lands for a large tract of land in the Arkansas Territory and an even larger one farther west.

Before the United States could relocate the Indians on these new lands, however, at least part of the land that had been set aside in the Arkansas Territory was already settled. It was apparent that the westward removal had not been aimed far enough west to escape the new nation's expansion. By the Treaty of January 20, 1825, 7 Stat. 234, the Choctaws were persuaded to cede back to the United States the eastern portion of the land given them in the Treaty of Doak's Stand. Similarly, the Cherokees who had voluntarily moved to Arkansas agreed to move again—farther west to a new tract of land, "*a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever." Treaty of May 6, 1828, 7 Stat. 311.

The prospect of the voluntary removal of the Indians to the land west of the Mississippi soon disappeared. For the most part, the Choctaws and the Cherokees who had not already left their eastern lands refused to give up the land that had long been their home. The abortive attempt to set aside Arkansas Territory land for the Indians justifiably made many of them doubt that the United States would protect them in their new lands. But at the same time the Indians were deciding to remain, the new settlers' expansion and desire for their lands increased. In Georgia, the state legislature, tired of waiting for the United States to fulfill its promise to extinguish Indian rights to Georgia lands,[4] asserted jurisdiction over the Cherokees and prepared to distribute the Cherokee lands. Mississippi soon followed suit, abolishing tribal government and extending its laws to Choctaw territory.

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[4]See n. 3, *supra*.

A clash between the obligation of the United States to protect Indian property rights on the one hand and the policy of forcing their relinquishment on the other was inevitable. With the passage of the Indian Removal Act of 1830, 4 Stat. 411, it became apparent that policy, not obligation, would prevail. In spite of the promises to protect the Indians' land and sovereignty, it was clear that the United States was unable or unwilling to prevent the States and their citizens from violating Indian rights.

Thus faced with the prospect of losing both their lands and way of life, the Choctaws agreed in 1830 to leave Mississippi and to move to new lands west of the Arkansas Territory. As a guarantee that they would not again be forced to move, the United States promised to convey the land to the Choctaw Nation in fee simple "to inure to them while they shall exist as a nation and live on it." In addition, the United States pledged itself to secure to the Choctaws the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334.

The Cherokees were at first determined to retain the Georgia lands on which they had by that time settled down, establishing farms and towns.[5] However, after a time, they, too, were forced to leave. In the Treaty of New Echota, December 29, 1835, 7 Stat. 478, the Cherokees who had remained in the East agreed to leave their lands and to join the Cherokees who had already moved west of the Missis-

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[5]The efforts on behalf of the Cherokees remaining in Georgia included two cases that were brought to this court, *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831), and *Worcester* v. *Georgia*, 6 Pet. 515 (1832). For a recent account of these and other Cherokee efforts, see Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500 (1969). See generally Federal Indian Law, *supra*, n. 3, at 180-200.

sippi. Once again, the United States assured the Indians that they would not be forced to move from their new lands: a patent would issue to convey those lands in fee simple, and they would never be embraced within the boundaries of any State or Territory.

The United States thus succeeded in its efforts to remove the Indians from their eastern lands. In exchange, by the Treaty of Dancing Rabbit Creek with the Choctaws in 1830 and the Treaty of New Echota with the Cherokees in 1835, the United States granted a vast area of its western territory to the two Indian Nations. The land thus granted to the Choctaws encompassed what is today approximately the southern third of the State of Oklahoma; to the north, the Cherokees received title to a tract of land in the eastern part of the remainder of the State with a perpetual outlet to and other rights in land farther west.

Although by later treaties other Indian tribes were settled on parts of the land originally included in these grants, and the Chickasaw Nation was granted an undivided one-fourth interest in the remainder of the Choctaw land, see Treaty of January 17, 1837, 11 Stat. 573; Treaty of June 22, 1855, 11 Stat. 611, the fee simple title to a vast tract of land continued to be held by the petitioner Indian Nations for well over half a century.

Then, again due in large part to the pressure of settlers who were encroaching on Indian lands,[6] Congress acted to change the arrangement. By § 16 of the Act of March 3, 1893, 27 Stat. 645, a commission was created to negotiate with the Indian tribes that had been located in Oklahoma on the allotment of land to their individual members in preparation for the final dissolution of the tribes. Thereafter, the Indians—including the Choctaws, Chickasaws, and Cherokees—agreed to the allotment of their lands and

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[6]See *Marlin* v. *Lewallen*, 276 U. S. 58, 61 (1928); *Choate* v. *Trapp*, 224 U. S. 665, 667-668 (1912).

the termination of tribal affairs. See Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716. Finally, Congress provided for the disposition of all petitioners' lands with the provision that any remaining tribal property "be held in trust by the United States for the use and benefit of the Indians." Act of April 26, 1906, § 27, 34 Stat. 148. The way was thus paved for Oklahoma's admission to the Union "on an equal footing with the original States," conditioned on its disclaimer of all right and title to lands "owned or held by any Indian, tribe, or nation." Act of June 16, 1906, §§ 3, 4, 34 Stat. 270, 271.

According to petitioners, they received title to the bed of the Arkansas River by treaty and patent from the United States. Because the land was not individually allotted or otherwise disposed of pursuant to the 1906 Act, title remained in petitioners or passed to the United States to be held in trust for them. The State, on the other hand, claims that petitioners never received title to the land. The courts below held in favor of the State, thus disposing of the case since it was undisputed that if title remained in the United States, it passed to Oklahoma upon admission to the Union as an incident of statehood. The sole question for review then is whether the treaty grants from the United States conveyed title to the bed of the Arkansas River to the Cherokee and Choctaw Nations.

II

We move then to the construction and effect of the treaties between petitioners and the United States. At the outset, the State argues that the bed of the Arkansas River was not included in the grants to petitioners even by the accepted standards of ordinary conveyancing since to a skilled draftsman "the land descriptions in the treaties, standing alone, actually exclude the river beds."

Part of the Arkansas River here in question is surrounded on both sides by land granted to the Cherokees,

and with regard to it the argument is at the least strained. There is no explicit exclusion of the river bed in the 1835 Treaty of New Echota; in fact, there is no reference at all to the river from "a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas" to its junction with the Canadian. See 7 Stat. 480. As we read the Cherokee treaties and the patent issued thereunder by the President, the Cherokee Nation was granted one undivided tract of land described merely by exterior metes and bounds. That portion of the Arkansas River between its junctions with the Grand and Canadian Rivers lies completely within those metes and bounds, and all of the land inside those boundaries including the river bed seems clearly encompassed within the grant.

Below its confluence with the Canadian, the Arkansas River forms the boundary between the land granted to the Cherokees to the north and the Choctaws to the south, and the treaties do explicitly refer to this portion of the river. In the Treaty of Doak's Stand in 1820, petitioner Choctaw Nation was granted all the land within the following boundaries:

> "*Beginning on the Arkansas River,* where the lower boundary line of the Cherokees strikes the same; thence *up the Arkansas to the Canadian Fork,* and up the same to its source; thence due South to the Red River; thence down the Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning." 7 Stat. 211. (Emphasis added.)

Ten years later, this grant was superseded by the Treaty of Dancing Rabbit Creek, which "varied the description a little and provided for a special patent," *Fleming* v. *McCurtain,* 215 U. S. 56, 59 (1909):

> "*beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the* United States, or to those limits; thence due south to

source of the Canadian fork; if in the limits of the Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning." 7 Stat. 333. (Emphasis added.)

And the patent issued to the Choctaw Nation in 1842 by President Tyler merely repeated the language of this latter treaty.

The Choctaw treaties preceded any grant to the Cherokee Nation; and, under them, petitioners Choctaw and Chickasaw Nations claim the entire bed of the Arkansas River between its confluence with the Canadian River and the Oklahoma-Arkansas border. The Cherokees, however, also have a claim to this part of the river, based on the language setting out the southern border of the land granted them in the Treaty of New Echota: From a point on the Canadian River,

"thence down the Canadian to the Arkansas; thence *down the Arkansas* to that point on the Arkansas where the eastern Choctaw boundary strikes said river . . . ." 7 Stat. 480. (Emphasis added.)

Moreover, they point to the patent issued them by President Van Buren in 1838, which described the southern boundary of their lands as follows:

"down the Canadian river on its north bank to its junction with Arkansas river; thence *down the main channel of Arkansas river* to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river . . . ." (Emphasis added.)

According to the Cherokee Nation, the United States thereby conveyed to it the north half of the Arkansas River from its junction with the Canadian to the eastern Oklahoma border. Petitioners thus are in disagreement about

the effect of the words in the treaties and patents with regard to this lower portion of the river.[7]

That disagreement, however, does nothing to make convincing even the State's argument that this part of the river bed was excluded from the grants as a matter of conveyancing law. About all that can be said about the treaties from the standpoint of a skilled draftsman is that they were not skillfully drafted. More important is the fact that these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, *e. g.*, *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899), and any doubtful expressions in them should be resolved in the Indians' favor. See *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918). Indeed, the Treaty of Dancing Rabbit Creek itself provides that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws." 7 Stat. 336.

Applying these principles here, we conclude that the entire Arkansas River below its confluence with the Grand River was within the metes and bounds of the treaty grants to petitioners. The State argues that the treaty terms "up the Arkansas" and "down the Arkansas" should be read to mean "along the bank of the Arkansas River." However, the United States was competent to say the "north side" or "bank" of the Arkansas River when that was what it meant, as it had in the 1817 grant to the Cherokees in the Arkansas Territory. See 7 Stat. 158. Even more damaging to the State's argument is the contemporaneous interpre-

[7]The courts below did not resolve the dispute between petitioners, and we likewise do not pass on that question.

tation of the treaty language by the President as reflected in the specific language of the Cherokee patent, "down the Canadian river on its north bank to its junction with Arkansas river; thence *down the main channel of Arkansas river.*"[8] (Emphasis added.) According to the State, the italicized part of this description should be read to mean "down the north bank of the main branch of the Arkansas River." However, not only does this reading itself seem to include part of the river bed—that underlying the "secondary" branches—but it also conflicts with this Court's interpretation of the term in *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77 (1922).

The facts involved in *Brewer-Elliott* were essentially similar to those of the present cases. There the United States had established a reservation for the Osage Indians which was bounded on one side by "the main channel of the Arkansas river." 260 U. S., at 81. The United States

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[8]This construction of the treaty term "down the Arkansas" indicates that at the minimum the boundary of the Choctaws was also the middle of the main channel. Congress was accustomed to using the terms "up" or "down" the river when designating a navigable river as the boundary between States, see, *e. g.*, Act of March 2, 1819, § 2, 3 Stat. 490 (Alabama); Act of February 20, 1811, § 1, 2 Stat. 641 (Louisiana); and, when it did so, the boundary was set as the middle of the main channel. See *Arkansas v. Mississippi*, 250 U. S. 39 (1919); *Iowa v. Illinois*, 147 U. S. 1 (1893).

Given this congressional usage, it seems natural for the President, on whose behalf the treaties had been negotiated, to have given the same interpretation to identical language in the analogous situation involving the boundary between petitioners Choctaw and Cherokee Nations, which had long been considered sovereign entities. In fact, this Court recognized the analogy in *Barney v. Keokuk*, 94 U. S. 324, 337 (1877), a case involving a grant bounded by the Mississippi River, when it quoted with apparent approval the following language from *Haight v. City of Keokuk*, 4 Iowa 199, 213 (1856): "The grant to the [Indians] was to them as persons, and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or states, and then the line would have been the *medium filum aquae*, as it is now between Iowa and Illinois." The grants to petitioners were undoubtedly to them as "a political society," and any "well founded doubt" regarding the boundaries must, of course, be resolved in their favor.

brought suit to establish the Indians' right to the river bed and the oil reserves beneath it, and the State of Oklahoma intervened to claim that the river bed had passed to it at statehood. The case came here after the Court of Appeals had held that "whether the river was navigable or non-navigable, the United States, as the owner of the territory through which the Arkansas flowed before statehood, had the right to dispose of the river bed, and had done so, to the Osages." *Id.*, at 80. This Court held that in the region in question the Arkansas River was nonnavigable and that "the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant *expressly carry the title to that line.*" *Id.*, at 87. (Emphasis added.) The question whether it would have been beyond the power of the United States to make the grant had the river been navigable was reserved for future decision.

In the present cases, there is no question that the Arkansas River is navigable below its junction with the Grand River.[9] However, we do not understand the State to argue the question reserved in *Brewer-Elliott*. Indeed, it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. See *Shively* v. *Bowlby*, 152 U. S. 1, 47-48 (1894). Rather, the question is whether the United States intended to convey title to the river bed to petitioners. See *Alaska Pacific Fisheries* v. *United States*, *supra*, at 87; *Moore* v. *United States*, 157 F. 2d 760, 763 (C. A. 9th Cir. 1946); cf. *Donnelly* v. *United States*, 228 U. S. 243, 259 (1913).

Turning then to that question, we think it clear, as did the Court of Appeals, that the parties to the treaties

[9]The District Court took judicial notice of the navigability at all relevant times of those portions of the Arkansas River in question, and that issue is not in dispute here. In the *Brewer-Elliott* case, this Court affirmed the finding of the District Court that "the head of navigation is and was the mouth of the Grand River." 260 U. S., at 86.

and patents did not pause specifically to provide for the ownership of the river bed. According to the State—even if the river bed was within the bounds of the grants to petitioner—we need look no further because "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State* Bank, 270 U. S. 49, 55 (1926). Even were we limited to the treaties and patents alone, the most specific language of those instruments is identical to that which we said "expressly" conveyed title to the river bed in *Brewer-Elliott*. However, nothing in the *Holt State Bank* case or in the policy underlying its rule of construction (see *Shively* v. *Bowlby*, *supra*, at 49-50) requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor. Indeed, the court in *Holt State Bank* itself examined the circumstances in detail and concluded "the reservation was not intended to effect such a disposal." 270 U. S., at 58. We think that the similar conclusion of the Court of Appeals in this case was in error, given the circumstances of the treaty grants and the countervailing rule of construction that well-founded doubt should be resolved in petitioners' favor.

Together, petitioners were granted fee simple title to a vast tract of land through which the Arkansas River winds its course. The natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and bed of rivers. To the extent that the documents speak to the question, they are consistent with and tend to confirm this natural reading. Certainly there was no express exclusion of the bed of the Arkansas River by the United States as there was to other land within the grants.

As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals

from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. See *Atlantic & Pacific R. Co.* v. *Mingus*, 165 U. S. 413, 435-436 (1897). We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive changes of the river's course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. Cf. *Pollard* v. *Hagan*, 3 How. 212, 229 (1845).

Finally, it must be remembered that the United States accompanied its grants to petitioners with the promise that "no part of the land granted to them shall ever be embraced in any Territory or State." In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding (on which Oklahoma necessarily places its principal reliance), that the United States retained title in order to grant it to some future State.

We thus conclude that the United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River within the present State of Oklahoma in the grants it made to petitioners. The judgments of the Court of Appeals are therefore reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I add a few words.

The Cherokees, pursuant to treaties with the United States, exchanged their aboriginal domain in the East for more than 140,000,000 acres of land west of the Mississippi, then in Indian Territory but now a part of Oklahoma. Pursuant to promises in the treaties, the United States on December 31, 1838, issued a patent to the Cherokees describing the lands by metes and bounds and conveying the lands here in question in fee simple.[1]

A portion of the Arkansas River is entirely within the grant to the Cherokees. It is therefore a mystery why all of the bed in that portion of the river was not conveyed to the Cherokees. The river bed was not reserved to the United States by the patent. The United States, however, made other reservations: (1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turned out to be within the bounds of these Cherokee lands; (3) the right to establish and maintain military posts and roads together with the free use of land, timber, fuel and materials for the construction and support of those facilities. Since the United States made some reservations but made no reservations of the river bed, and if fair dealing is the standard, one would conclude, I think, that the river bed was the tail that went with the hide.

As respects the Choctaws, another section of the Arkansas River was the boundary between the Choctaw and the Cherokee grants. Whatever may be the rights between the Cherokees and the Choctaws, it seems clear to me that since one portion of the Arkansas was within the

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[1]In addition to the millions of acres conveyed to the Cherokees in fee simple, which included the land surrounding the segment of the Arkansas River here in question, they were guaranteed lands to the west of that tract as "a perpetual outlet west" which provided for "free and unmolested use" of those lands.

exterior boundaries of the Cherokee grant and another portion was within the exterior boundaries of the Choctaw grant, the river bed of each of those segments went to the respective grantees in fee simple.

Here an entire region was conveyed to these tribes as part of their resettlement,[2] with assurances of self-government[3] and with pledges that their new homelands

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[2]The details of the removal of the Cherokees from their ancestral lands are related in *Western Cherokee Indians* v. *United States*, 27 Ct. Cl. 1, 20 *et seq.* While 6,000 had moved west to their new lands by 1838, 18,000 were still in their ancestral homes.

"The Eastern Cherokees were prisoners in Georgia, under the guard of 5,000 United States soldiers, who had hunted them down from their mountains and driven them out of their valleys and were now bringing them to the terms of an enforced emigration." *Id.*, at 20.

They were finally forcibly removed by the U. S. Army under General Scott:

"He moved quickly and successfully, and has thus recorded the most painful experience of his military life:

" 'Food in abundance had been provided at the depots, and wagons accompanied every detachment of troops. The Georgians distinguished themselves by their humanity and tenderness. Before the first night thousands—men, women, and children, sick and well—were brought in. Poor creatures. They had obstinately refused to prepare for the removal. Many arrived half starved, but refused the food that was pressed upon them. At length the children, with less pride, gave way, and next their parents. The Georgians were the waiters on the occasion, many of them with flowing tears. The autobiographer has never witnessed a scene of deeper pathos.' " *Id.*, at 23.

For early incidents involving this Court in aspects of the removal problems see M. James, Andrew Jackson: Portrait of a President 280-281, 304-305 (1937); 1 C. Warren, Supreme Court in U. S. History, c. 19 (1937); *Worcester* v. *Georgia*, 6 Pet. 515.

[3]Our agents said the following to the Cherokee Council on July 31, 1837: "Here you are subjected to laws, in the making of which you have no voice; laws which are unsuited to your customs, and abhorrent to your ideas of liberty. There, Cherokees, you will make laws for yourselves, and establish such government as in your own estimation may be best suited to your condition. There, Cherokees, in your new country, you will be far beyond the limits or jurisdiction of any State or Territory. The country will be yours; yours exclusively. No other people can make claim to it, and you will be protected by the vigilant power of the United States against the intrusion of the white man." S. Doc. No. 120, 25th Cong., 2d Sess., 988.

would never be part of any State.[4] They were indeed constituted as the sovereign autonomy established in lieu of a prospective State.[5]

The title held by these tribes was not the usual aboriginal Indian title of use and occupancy but a fee simple, cf. *United States* v. *Creek Nation*, 295 U. S. 103, terminable if and when these Indian nations ceased to exist or abandoned the territory—conditions not yet occurring. The reliance by the Court of Appeals on *United States* v. *Holt State Bank*, 270 U. S. 49, was therefore misplaced as that case involved only the aboriginal Indian title of use and occupancy. *Id.*, at 58-59.

The United States, speaking through the Solicitor General, has filed a brief *amicus* taking that position in these cases and maintaining it vigorously on oral argument. It concedes, as it must in light of *Shively* v. *Bowlby*, 152 U. S. 1, 49-50, that while the United States holds a domain as a territory, it may convey away the right to the bed of a navigable river, not retaining that property for transfer to a future State, though as stated in *Holt State Bank* that purpose is "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U. S., at 55. Such exceptional circumstances are present here.

The treaties with the present Indians solemnly assured them that these new homelands would never be made part

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[4]The Treaty with the Cherokees of December 29, 1835, 7 Stat. 478, provided in Article 5 that no lands conveyed shall without the consent of the Cherokees ever "be included within the territorial limits or jurisdiction of any State or Territory." And see Article IV of the Treaty of Sept. 27, 1830, 7 Stat. 333.

[5]The Treaty with the Cherokees of May 6, 1828, 7 Stat. 311, spoke of the desire of the United States to provide the Cherokees *"a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State."

of a State or Territory. So it is reasonable to infer that the United States did not have a plan to hold this river bed in trust for a future State. As the United States says, we would have to indulge "a cynical fiction without any basis in fact" to attribute such a purpose to the parties. Sixty years later, however, Congress was intent in creating a State out of these lands.[6]

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[6]The story of the exploitation of Indians by state and local agencies has been recently summarized by William Brandon:

"Termination is truly a word of ill omen to tribal Indians. Its meaning in Indian affairs is the termination of 'Federal responsibility,' the responsibility of the Federal Government to act as trustee for Indian lands, rights, and resources; the responsibility to protect Indian groups in these rights and possessions—protect them particularly against states, counties, cities, or other local powers that might divest them of their rights and possessions—and to provide certain services such as education and health.

"These responsibilities are based upon treaty promises or other equally legal commitments, in which the Federal Government pledged, in return for cessions of value, to render unto specific Indian groups specific rights and their protection, plus the provision of schools, hospitals, sawmills, teachers, doctors, tools and implements, roads, supplies when needed—all the services of the modern world, to be supplied and administered by the Federal Government rather than administered under state and local jurisdictions, because of well-founded apprehensions that state and local jurisdictions might not be trustworthy in carrying out such promises." Progressive, January 1970, p. 38.

E. Cahn, Our Brother's Keeper 21 (1969), states the same theme:

"The Indian knows that termination takes many forms. He can be flooded out of his reservation; he can be relocated; his reservation can be sold out from under him if he cannot meet taxes to which it is subject. His limited power to protect himself on the reservation from local prejudice and discrimination can be wiped away by the substitution of state laws for tribal law, and state jurisdiction for tribal jurisdiction. All of these, the Indian knows, are variants on one basic truth: the United States Government does not keep its promises. Sometimes it breaks them all at once, and sometimes slowly, one at a time. The result is the same—termination. When the Indian is asked to forsake his status under the Bureau in exchange for cash, for promises of technical aid, for public works improvements and industrial developments, he has learned to expect two things:

"*—That the promises will not be kept.*

"*—That even if they should be kept, they will prove inadequate to maintain the Indian at even his reservation level of deprivation.*"

Friction between the Indians and the whites who sought to settle on these lands mounted. As time passed the American attitude towards these treaties became as hostile as the opinion below. The Commissioner of Indian Affairs in his 1886 Report spoke of the exploitation of many Indians by a few Indians who had a monopoly of land and he attacked the treaties as such:

> "[I]t is perfectly plain to my mind that the treaties never contemplated the un-American and absurd idea of a separate nationality in our midst, with power as they may choose to organize a government of their own, or not to organize any government nor allow one to be organized, for the one proposition contains the other. These Indians have no right to obstruct civilization and commerce and set up an exclusive claim to self-government, establishing a government within a government, and then expect and claim that the United States shall protect them from all harm, while insisting that it shall not be the ultimate judge as to what is best to be done for them in a political point of view. I repeat, to maintain any such view is to acknowledge a foreign sovereignty, with the right of eminent domain, upon American soil—a theory utterly repugnant to the spirit and genius of our laws, and wholly unwarranted by the Constitution of the United States."

H. R. Exec. Doc. No. 1, pt. 5, 49th Cong., 2d Sess., 87. But cf. the views of Robert L. Owen, U. S. Indian Agent, in H. R. Exec. Doc. No. 1, pt. 5, vol. 2, 50th Cong., 2d Sess., 134-135 (1888). And see A. Debo, The Rise and Fall of the Choctaw Republic 245 *et seq.* (1934).

A commission was created to negotiate an agreement with these tribes superseding the earlier treaties, all as related in *Choate* v. *Trapp*, 224 U. S. 665, 667-670. An agreement was in time reached whereby tribal lands were allotted to individual members of the tribe, with any remaining tribal land passing to the United States as trustees for the

Indians. 34 Stat. 137. The bed of the Arkansas was not allotted. The next year—1907—Oklahoma was admitted to the Union on an equal footing with the original States. 34 Stat. 267. Certainly this cession by the tribes of their interest in the river bed of the Arkansas to the United States in trust for their members was no possible vehicle for transferring that title to Oklahoma.[7]

The Court properly makes these cases candidates for application of the classic rule that treaties or agreements with Indians are to be construed in their favor, not in favor of commercial interests that repeatedly in our history have sought to exploit them. The idea was perhaps best stated in *United States* v. *Winans*, 198 U. S. 371, 380-381:

> "[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' 119 U. S. 1; 175 U. S. 1. How the treaty in question was understood may be gathered from the circumstances."

We should therefore resolve any doubts in these cases in favor of these Indians, mindful of what President Jackson said at a meeting with the Choctaws and Chickasaws:

> "Brothers, listen: the only plan by which this can be done, and tranquillity for your people obtained, is, that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have.

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[7]The Cherokee Nation claims to have negotiated some 13 sand and gravel leases for the bed of the Arkansas River between April 12, 1883, and May 27, 1893—prior to the admission of Oklahoma into the Union. The record does not disclose the date when the State of Oklahoma first assumed the role of lessor of the river bed, although several cases have involved such leases by the State. See, *e. g.*, *Lynch* v. *Clements*, 263 P. 2d 153.

> Your great father will give it to you for ever, that it may belong to you and your children while you shall exist as a nation, free from all interruption.
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> * * * * * *
>
> "Peace invites you there; annoyance will be left behind; within your limits, no State or territorial authority will be permitted; intruders, traders, and above all, ardent spirits, so destructive to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission." S. Doc. No. 512, 23d Cong., 1st Sess., Vol. 2, 240-242.

Only the continuation of a regime of discrimination against these people,[8] which long plagued the relations between the races, can now deny them this just claim.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

At issue in these cases is the ownership of the lands underlying the Arkansas River from its confluence with the Grand River in Oklahoma downstream to the western border of Arkansas. The Arkansas River is a navigable stream below, but not above, its junction with the Grand River. The contending parties are three Indian tribes on the one hand and the State of Oklahoma on the other. The Cherokees base their claim on a United States patent of 1838 and underlying treaties, the Choctaws and the Chickasaws on an 1842 patent also issued in fulfillment of prior

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[8]Sequoyah, the great Cherokee from Tennessee, whose home stood on the banks of the Little Tennessee River, was crippled for life on a hunting trip; and in his inactive life thereafter invented the Cherokee syllabary, inspired by the "talking leaves" or written and printed pages by which the whites communicated. His syllabary contains some 80 syllables in the Cherokee language. His memory is perpetuated in the name of the *genus* of California giant redwoods and his statue was placed in Statuary Hall of the National Capitol in 1917.

treaty commitments. The State claims under the settled doctrine that a newly admitted State takes title to the beds of all navigable rivers within its borders; the State denies that the prior patents conveyed the river bed. The patent to the Cherokees included property on both sides of the Arkansas River from its confluence with the Grand River downstream to its junction with the Canadian River. From the Canadian River to the Arkansas border, the Arkansas River was the boundary between Cherokee lands on the north side and the Choctaw lands on the south.

According to the Court, the Indians became the owners of all of the river bed from the Grand River to the Arkansas border: the river bed between the Grand River and the Canadian River is Cherokee property because the metes and bounds description of the grant crossed the river without purporting to exclude the river bed; the remaining portion of the river bed is said to be Indian property because by ordinary conveyancing standards the relevant patents and treaties reveal an intent by the United States to convey the river bed to the tribes. I differ with the Court as to both portions of the river bed.

I

As far as riparian rights are concerned—and for other purposes too—the policy and applicable laws of the United States have always distinguished between navigable and nonnavigable streams. Section 931 of Title 43 of the United States Code, Rev. Stat. § 2476, which dates from 1796, does so unmistakably:

> "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

The owners of land adjacent to a nonnavigable stream own the river bed, but the surveys of public lands stop with the banks of navigable streams; conveyances by the United States of land located on a navigable river carry no interest in the river bed under federal law. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 288-289 (1869), made the difference very clear:

> "[T]he court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways."

Packer v. *Bird*, 137 U. S. 661, 672 (1891), is to like effect. *Shively* v. *Bowlby*, 152 U. S. 1, 49-50 (1894), re-emphasized that:

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard

to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The issue in *Shively* was whether the grantee of lands along a navigable river in Oregon Territory had an interest in the river bed by reason of his federal grant. It was held that he did not.

In 1845, *Pollard* v. *Hagan*, 3 How. 212, held that the United States had no power, except where state law permitted, to convey an interest in the bed of a navigable river after the State in which it was located had been admitted to the Union. The Court also implied that because the beds of navigable streams were held in trust for future States, the United States was without power to dispose of the beds prior to statehood. This implication was repudiated by statements in such later cases as *Goodtitle* v. *Kibbe*, 9 How. 471, 478 (1850), and *Shively* v. *Bowlby*, *supra*, at 47-48. In the words of the latter:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." 152 U. S., at 48.

Nevertheless, whether the United States had only a restricted power to convey interests in navigable river beds prior to statehood was deemed an open question in *Brewer-*

Elliott Oil & Gas Co. v. *United States*, 260 U. S. 77, 85-86 (1922); decision on that question was reserved as was decision on the issue whether, if the power to convey was limited to certain purposes, provision of a home for an Indian tribe came within one of these permitted purposes. Three years later, *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926), again recognized that "the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency."

The ownership of lands under navigable waters was deemed an incident of sovereignty, *Martin* v. *Waddell*, 16 Pet. 367, 409-411 (1842), and whatever the power of the Federal Government to convey such lands lying in its unorganized territories, Congress never undertook to do so by general laws. *Shively* v. *Bowlby, supra*, at 48-50. Conveyance of a river bed would not be implied and would not be found unless the grant "in terms embraces the land under the waters of the stream," *Packer* v. *Bird, supra*, at 672; *Shively* v. *Bowlby, supra*, at 47-48. Such disposals by the United States "during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank, supra*, at 55.

II

Against this doctrinal background, for either the Cherokees, the Choctaws, or the Chickasaws to prevail, there must be found in their grant a "very plain" basis for concluding that the United States intended to convey an interest in the river bed. As I see it, neither the patents nor the treaties here involved satisfy that standard.

The patent to the Choctaws in 1842, which merely quotes from the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333, describes the northern boundary of the Choctaw grant as "[b]eginning near fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork . . . ." An earlier treaty, the 1820 Treaty of Doak's Stand, 7 Stat. 210, described the northern boundary of the Choctaw lands as going "up the Arkansas to the Canadian Fork . . . ." The quoted phrases of the patent (and the Treaty of Dancing Rabbit Creek) and of the Treaty of Doak's Stand are the sole bases for the Choctaw claim to the entire bed of the Arkansas River from the western boundary of Arkansas upstream to the junction with the Canadian River. The Cherokees claim that the conveyance gave the Choctaws only the southern half of the river bed; the State of Oklahoma claims that the northern boundary of the Choctaw lands went up the river on its south bank and hence gave the Choctaws none of the river bed since the river was navigable and there was no express conveyance of the river bed to the Choctaws.

As for the Cherokees, their southern boundary from the Canadian River to the Arkansas border is described in the 1838 patent as proceeding from the north bank of the Canadian River at its junction with the Arkansas River, "thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of the Arkansas river . . . ." The patent was in execution of three prior treaties. The 1835 Treaty of New Echota, 7 Stat. 478, in describing the land to be conveyed, repeated the description of the Treaty of February 14, 1833, 7 Stat. 414, which was supplemental to the Treaty of May 6, 1828, 7 Stat. 311. The description in the Treaty of New Echota did not contain the "main channel" language later used in the patent; from the Canadian, the southern boundary ran "down the Arkansas to that point

on the Arkansas where the eastern Choctaw boundary strikes said river . . . ." The Cherokees claim this language gives them the northern half of the river bed. The Choctaws and the State claim that the Cherokees have no interest in this part of the river bed.

Insofar as the river bed from the Canadian River to the Arkansas border is concerned, the terms of the patents and the treaties are obviously a far cry from what the cases require to evidence the intention of the United States to dispose of lands under a navigable river. But it is said that these cases are irrelevant where the grantee is an Indian tribe and that countervailing considerations require treaties with Indian tribes to be interpreted as the treaties would have been understood by the Indians. Reliance is also placed on the provision in the 1830 Choctaw treaty stating that "wherever well founded doubt shall arise," the treaty shall be construed in favor of the Choctaws. But I find it difficult to conclude from such murky language that the United States intended to reject its historic policy with respect to beds of navigable rivers in executing these treaties and patents. Nor is there any evidence whatsoever that the Indians of that day would have considered the land under a navigable river to be of any utility to them or as being included in a grant of lands adjacent to the river. Indeed, the Treaty of Dancing Rabbit Creek expressly negatives any inference that the United States was sharing with the Choctaws any of its sovereignty over the navigable portion of the Arkansas River. It provided that "[n]avigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the U. S."

The Cherokee patent recited that the treaty lands had been surveyed and the description in the patent was taken from the survey. Field notes of an 1831 survey of the eastern Cherokee boundary show unmistakably that the surveyor "fixed, the South East corner of the Cherokee lands" on the north bank of the Arkansas River and that from

this point it was "64.50 Ch, to the South bank, where the northern extremity of the Eastern boundary of the Choctaw lands, strikes the Arkansas River."

The Choctaw grant had also been surveyed pursuant to treaties executed prior to the patent. The field notes of an official survey made in 1821 show that the northern point of the eastern boundary of Choctaw territory was on "the south bank of the Arkansas River . . . distance from the Cherokee corner on the north bank of the river, one mile and thirty chains, Arkansas River 630 yards wide," and that the surveyor on "October 4th started from a post on the south side of the Arkansas, opposite the lower boundary of the Cherokees to meander the Arkansas." A plat of another survey of Choctaw lands made in 1825 shows the northern terminus of the eastern Choctaw boundary as being on the south side of the river.

There is little, if anything, in these early surveys to support ownership of the river bed in the Indians. On the contrary, the indications clearly are that downstream from the Canadian River the southern border of the Cherokees' land was on the north side of the Arkansas River and the northern boundary of the Choctaws' land was on the south side.

I find unimpressive the Court's reliance on *Brewer-Elliott Oil & Gas Co.* v. *United States, supra,* for the proposition that because the southern boundary of the Cherokee lands ran "down the main channel of Arkansas river" the northern half of the river bed belonged to the Indians. In *Brewer-Elliott* the Cherokees had ceded certain land to the United States and from that land the United States created a home for the Osage Indians, "[b]ounded . . . on the south and west by . . . the main channel of the Arkansas river . . . ." 17 Stat. 229. As stated by the Court of Appeals, the central issue was whether the Osage Indians owned "the bed of the Arkansas river north of the thread of the main

channel thereof, which was the south boundary of the lands of the Osage Tribe of Indians." 270 F. 100, 101 (C. A. 8th Cir. 1920). The Court of Appeals ruled that the river at that point was not navigable and that "riparian grantees and owners under the acts of Congress and under the law applicable in 1838, 1872, and 1883 at the place where these leased premises lie became the owners of the beds of unnavigable streams to the respective threads thereof. Rev. Stat. § 2476 [43 U. S. C. § 931]; *Railroad Co.* v. *Schurmier* [*sic*], 7 Wall. 272, 287 . . . ." 270 F., at 109. This Court affirmed, pointing out, as was obviously true, that the grant extended "as far as the main channel . . . ." 260 U. S., at 87. Nothing the Court said, however, is any basis for construing a grant to or as far as the main channel of a *navigable* river as an express grant of any lands under that channel.

Much is made of the declarations in the treaties with the Cherokee and the Choctaw Nations that the Indian lands would not be included within any State or Territory. It is argued that in view of these declarations the United States had no reason to reserve the river bed. But this is a narrow view of the historic policy of the United States. Navigable rivers in the public domain were a public resource and lands underlying them were not to be conveyed to private hands by the United States. Whether or not it was anticipated that the public domain would be included in a future State, congressional policy, declared early in our history, was that conveyances of public lands bordering on navigable rivers carried no title to the adjoining river bed.

I cannot, therefore, conclude that either the Cherokees or the Choctaws took any interest in the bed of the Arkansas River, at least from the junction of the Arkansas River and the Canadian River downstream to the Arkansas border.

III

The river bed above the Canadian River is said to be owned by the Cherokees because the tribe was granted lands on both sides of the river pursuant to a single metes and bounds description the calls of which crossed the river without excluding the river bed. It is quite true that if one plots out the conveyance described by the patent the Arkansas River is included within the perimeters of the granted property. But there is no express reference to the river bed, the river was a navigable stream, and the policy of the United States was not to convey lands underlying such waters. No such conveyance should be recognized unless the intention to make such a conveyance was unmistakably stated. No one suggests that the Cherokees were granted full sovereignty over the Arkansas River, that the United States had conveyed away its power to control navigation and commerce on the Arkansas, or that the public had lost its right to travel the navigable portion of the Arkansas by virtue of the conveyance to the Cherokee Nation. There being no indications that the Indians thought one way or the other about the underwater lands or that they had any use for them in those days, the evidence is insufficient to prove an intent on the part of the Government to convey the river bed. Cf. *United States* v. *Holt State Bank, supra.*

Even if it were otherwise, however, the conveyance to the Cherokees was to the Cherokees as a Nation; it created no rights, legal or equitable, in individuals. Cf. *Fleming* v. *McCurtain,* 215 U. S. 56 (1909). If the river bed passed to the tribe, it was to be held by the Nation as property common to all. Moreover, the Cherokee patent expressly provided "that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same." The Choctaw patent and treaties contained a similar condition. Such provision limited the duration of title and qualified "the

absoluteness of the earlier words, 'in fee simple.'" *Fleming* v. *McCurtain, supra,* at 61. The significance of the limitation is that pursuant to agreements reached with the Cherokee, Choctaw, and Chickasaw Nations, Congress early in this century provided for the allotment of tribal lands to individual members of the tribe, terminated the general powers of the tribal governments and continued tribal existence for limited purposes only under the supervision of the Interior Department. See Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716; Act of April 26, 1906, 34 Stat. 137. Tribal lands for the most part were conveyed to individual Indians or sold. Transfers of lands to individuals along the navigable portion of the Arkansas River neither expressly nor by implication carried with them the river bed. The former Indian territory is not now either occupied or owned solely by Indians but is widely held by diverse peoples and interests in the State of Oklahoma. Should it now be held that the title to the river bed, severed from and no longer serving communal property, remains in the tribe, to be administered or sold by it for purely private purposes? I think not. For the purposes anticipated by the treaties and patents, the Cherokee, Choctaw, and Chickasaw Nations ceased to exist as general governmental entities in 1906. Oklahoma became a State in 1907 and took title to the river bed, which had meanwhile reverted to the United States if title to the river bed had ever been in the Indian Nations.

I would affirm the judgment of the Court of Appeals.

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Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-497

THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

THE CHEROKEE NATION, THE CHOCTAW NATION, and
THE CHICKASAW NATION,
Respondents.

RESPONSE OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

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October, 1972

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In the
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RESPONSE OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

Comes now the respondent, Commissioners of the Land Office of the State of Oklahoma, pursuant to United States Supreme Court Rule Number 21, paragraph 4, and advises the Court that said respondent was an appellant in Causes No. 71-1210 and 71-1295, United States Court of Appeals for the Tenth Circuit. It is further alleged and averred by this respondent that the Commissioners of the Land Office, as Trustees for the Common Schools of Oklahoma have exercised dominion and control over the lands which are the subject matter of this controversy since the admission of Oklahoma as a State.

CONCURRENCE OF COMMISSIONERS OF THE LAND OFFICE WITH ALLEGATIONS OF FACT AND LAW AS PRESENTED BY PETITIONER

Respondent, Commissioners of the Land Office, concurs in each and every allegation as presented in the Petition for the Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, which was filed in this cause by the State of Oklahoma.

ADDITIONAL ARGUMENT BY RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent, the Commissioners of the Land Office, for further argument in support of the State of Oklahoma's Petition for a Writ of Certiorari alleges and avers that one of the major elements in the finding of the Court in *Choctaw Nation, et al.* v. *Oklahoma, et al.*, 397 U.S. 620, that ownership of the lands in question vested in the Indian Tribes was based on the fact that the Indians had sold sand and gravel from the river bed; thus indicating that all parties concerned had the intent that ownership of the river bed should vest with the Indians. We agree with the Court in *Choctaw Nation, et al.* v. *Oklahoma, et al., supra*, wherein the following language was used:

> "As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. See Atlantic & Pa-

cific R. Co. v. Mingus, 165 U.S. 413, 435-436 (1897). We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive changes of the river's course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. Cf. Pollard v. Hagan, 3 How. 212, 229 (1845)."

Respondent would further refer to footnote number 7 in Mr. Justice Douglas' concurring opinion wherein we find the following language:

"The Cherokee Nation claims to have negotiated some 13 sand and gravel leases for the bed of the Arkansas River between April 12, 1883 and May 27, 1893 —prior to the admission of Oklahoma into the Union. The record does not disclose the date when the State of Oklahoma first assumed the role of lessor of the river bed, although several cases have involved such leases by the State. See, e.g., Lynch v. Clements, 263 P.2d 153."

Respondent argues that there is no evidence or indication that the Indians sold any sand or gravel after Statehood. The question should be reviewed as to whether the subsequent open and notorious sale of such sand and gravel by the Commissioners of the Land Office and the payment of the proceeds thereof to the Common Schools of the State

of Oklahoma should not be considered as an evidentiary matter indicating that the Indians, the United States of America and the State of Oklahoma had a tacit meeting of the minds that title to the river bed did indeed pass to the State of Oklahoma for the use and benefit of the school system of the State of Oklahoma.

CONCLUSION

Respondent concurs in each and every allegation of petitioner, State of Oklahoma, and further, argues that the overt act of the Commissioners of the Land Office of selling sand and gravel and applying the proceeds to the use and benefit of the Common Schools constitutes agreement, by the parties herein, to reversion of the title of the river bed to the State of Oklahoma.

WHEREFORE, premises considered, respondent prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this above captioned case on June 1, 1972, in Causes No. 71-1210 and 71-1295 in that Court.

Respectfully submitted,

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October, 1972

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CHEROKEE NATION IN OPPOSITION

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BRIEF OF THE CHEROKEE NATION IN OPPOSITION

CITATIONS TO OPINIONS BELOW

The District Court did not write an opinion in this case, rather it disposed of all issues in its Pretrial Order of April 14, 1971, and its Judgment entered the same date. See Appendices A and B hereto. There have been two decisions by the Court of Appeals for the Tenth Circuit in this case which are reported at 402 F.2d 739 (1968) and 461 F.2d 674 (1972).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The petitioner has asserted that the instant case presents two questions for decision by this Court. The Cherokee Nation respectfully submits that the Petition presents no questions which have not already been passed upon by this Court in its earlier decision reported at 397 U.S. 620. If there is a question at all, it is whether the lower courts followed the mandate of this Court and conducted further proceedings consistent with its opinion.

STATUTES AND TREATIES

This Court has previously reviewed and considered the operable treaties, patents and statutes dealing with the granting of fee simple title to the Cherokee Nation and the present disposition of such title. However, of particular interest at this time are: The Cherokee Treaty at New Echota, Georgia, with the Cherokee Nation December 29, 1835 [7 Stat. 478], proclaimed May 23, 1836; the Patent executed by President Martin Van Buren, December 31, 1838, and Sections 27 and 28 of the Act of April 26, 1906, 34 Stat. 137, which are here set forth as Appendices C, D, and E.

STATEMENT OF THE CASE

The facts relating to the genesis of this case and its procedural development were previously presented to this Court, when it originally reviewed the matter and rendered its decision in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620. However, in order that all the facts may be before the Court, rather than merely the final fragment of this seem-

ingly endless litigation, the Cherokee Nation will set forth all the facts to date. The mere statement of the case discloses that when this Court, on April 27, 1970, concluded:

> ". . . the United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River within the present State of Oklahoma in the grants it made to petitioners. The judgments of the Court of Appeals are therefore reversed, and the cases are remanded for further proceedings consistent with this opinion." 397 U.S. 620, 625.

it decided the questions now raised by the Petitioner. This Court rendered its opinion only after the matter had been fully briefed by the parties, after the Government and *amicus curiae* had submitted memoranda, and the case had been twice argued before the Court. The Cherokee Nation submits that the Court received and reviewed essentially the same arguments as are made now.

On December 9, 1966, the Cherokee Nation filed an action in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and its lessees for an accounting and an injunction against the continued use of the land underlying the bed of the Arkansas River [Civil Action No. 6219]. The Cherokee Nation alleged that pursuant to the Treaties of 1828, 1833 and 1835 [7 Stat. 311; 7 Stat. 414; and 7 Stat. 478] and the patent of 1838, the United States granted to the Cherokee Nation the fee simple title to all the land within the metes and bounds description, including the bed of the Arkansas River. The Cherokee Nation further alleged that as a consequence of Section 27 of the Act of April 26, 1906 [34 Stat. 137] (App.

E) "fee title to said river bed lands described herein, as 'lands belonging to the Cherokee Tribe' passed and became vested in the United States in trust for the use and benefit of the members of said Cherokee Nation or Tribe and their respective heirs . . ." In February 1967, the State of Oklahoma filed its answer and counterclaimed to quiet title asserting that upon its admission to the Union title to the river bed of the Arkansas River within its borders passed to and became the property of the State of Oklahoma by operation of law.

The District Court granted the motion of the Choctaw and Chickasaw Nations to intervene as plaintiffs and on September 8, 1967, the Choctaw and Chickasaw Nations filed their answer asserting title to the entire bed of the Arkansas River from the confluence of the Arkansas River and Canadian River to the eastern boundary of the State of Oklahoma.

Prior to the entry of the Choctaw and Chickasaw Nations into the suit, the District Judge had issued a Memorandum of Decision setting forth the operable guidelines of the litigation. Included in the decision was the following:

> "2. The ownership of the river bed. This involves a determination of the legal effect of the treaties between the United States and the Indian Tribes with respect to the land conveyed to the Tribes and as an incident thereto a determination of the rights of the State of Oklahoma in the river bed."

2. Ownership of the River Bed.

> ". . . After considering these and the arguments of counsel relating thereto, the court has concluded that

as a matter of law regardless of the area properly included within the boundary descriptions of the tribal domains of the Choctaws and the Cherokees in what is now Oklahoma, *it was not the purpose or intent of the United States to convey to either tribe ownership of nay part of the Arkansas River* below its confluence with the Grand River, and that no act of Congress or patent issued to the tribes had this effect. This section or part of the Arkansas River became the property of the United States following the Louisiana Purchase in 1803 and *remained the property of the United States* until Oklahoma was admitted to the union. At that time it became the property of the State of Oklahoma by operation of law, . . ." (Emphasis supplied.)

An appeal was taken to the Tenth Circuit Court of Appeals by notice dated January 24, 1968. At that time the Indian Tribes and the State presented the following issues for review:

"In the sale and exchange of lands with the Cherokee Nation, pursuant to Treaty and Patent, did the United States reserve for a future state title to the land underlying the navigable portions of the Arkansas River in present Oklahoma? (Cherokee brief page 1).

"In the treaties with the Cherokees and Choctaws and the patents authorized by the treaties, did the United States definitely and plainly express an intention to convey the river bed of the Arkansas River below its confluence with the Grand River to the Cherokees or the Choctaws?" (State's brief page 2).

The Court of Appeals in its first opinion, *Cherokee Nation v. State of Oklahoma*, 402 F.2d 739, affirmed the decision of

the lower court. In this opinion, the Appellate Court noted clearly:

> "Title to the river bed in question passed to Oklahoma on admission, *unless prior* thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to make such divestiture." *Id.* at 745. (Emphasis supplied.)

The Nations petitioned for Writ of Certiorari to the Supreme Court, which was granted on April 21, 1969. After two oral arguments before the Supreme Court, the decision of the Court of Appeals was reversed and remanded on April 27, 1970, "for further proceedings consistent with this opinion."

The State of Oklahoma filed its Petition for Rehearing in May, 1970, which was denied by order of the Supreme Court dated June 1, 1970. Pursuant to the directive of the Supreme Court, the Court of Appeals ordered on July 21, 1970:

> "that this case is remanded to the United States District Court for the determination of unresolved issues and such other proceedings as are consistent with the decision of the United States Supreme Court. The mandate shall issue forthwith."

A pretrial conference was held on August 14, 1970, after which the District Court issued its pretrial order setting forth the various issues raised by the parties. Essentially, there were four issues asserted to be remaining: (1) the conflicting claims between the tribes; (2) the actual accounting; (3) the chain of title; (4) the propriety of the accounting action and extent of such accounting. The court

directed that briefs be submitted by the parties on all issues. After consideration of the briefs of counsel on January 12, 1971, the District Court issued its Pretrial Order and stated:

> "It is the opinion of this court that they [the title and interest claims of the defendants] were disposed of; that the decision of the Supreme Court precludes any finding here that prior to Oklahoma's admission to the Union ownership of the river bed was restored to the United States through loss by the Indian Nations of their status as governmental sovereigns, . . ., or lost through adverse possession, . . ."

Further, the court decided the dispute between The Cherokee Nation and Choctaw and Chickasaw Nations, specifically left unresolved by the Supreme Court, in the following manner:

> "These parties have agreed that no evidence is required for the resolution of their disagreement here; that their rights in the matter depend upon the legal effect of the treaties and patents by which they acquired their respective domains west. And from an examination of the applicable language of these documents this court has concluded there is no realistic basis for dispute between them—that the dividing line between their respective tribal properties was fixed as the middle of the main channel of the Arkansas River."

In February 1971, the State and its various leaseholders submitted briefs with regard to the nature and scope of the relief available to the Nations.

The District Court, after consideration of the briefs, entered its Pretrial Order and Judgment on April 14, 1971.

(See Appendices A and B attached hereto.) Thereafter, on April 23, 1971, the Choctaw and Chickasaw Nations filed their Notice of Appeal (No. 71-1210) and on May 5, 1971, the State of Oklahoma and its various lessees filed a Joint Notice of Apppeal (No. 71-1295). (See Pet. Exhibit A.)

The Tenth Circuit Court of Appeals in its second decision in this case affirmed the decision of the District Court with regard to the claims of the State holding "A fair reading of the opinions, majority, concurring and dissenting of the Supreme Court requires the conclusion that the Supreme Court decided present ownership."* *Cherokee Nation* v. *State of Oklahoma*, 461 F.2d 674, 677.

The State of Oklahoma, thereafter filed a Petition for Rehearing which was denied on June 27, 1972, and filed its Petition for Certiorari with this Court which was docketed on September 25, 1972.

ARGUMENT

I. There Is No Important Question Presented for Decision

The Petitioner argues that the rights of many private citizens and governmental entities are dependent upon a definitive answer to the question whether the lands in question were granted to the Indian Nations in their sovereign capacity. This case does not present a question of such importance as to merit review by this Court. Indeed, in its prior opinion, 397 U.S. 620, this Court decided either directly or implicitly the questions now presented by the petitioner and considered all points now raised.

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* The Court of Appeals reversed on jurisdictional grounds the District Court's opinion resolving the conflicting claims of the Indian Nations.

Since April 27, 1970, the State of Oklahoma has known that in the opinion of the Supreme Court, by solemn treaty and patent the United States did convey fee simple title to the lands underlying the Arkansas River to the Indian Nations, and that such title is presently held by them for the use and benefit of their enrolled members. See Section 28, Act of April 26, 1906 [34 Stat. 137, 148]; 397 U.S. 620, 625. Simply stated, the State of Oklahoma does not approve of the decision rendered by this Court. Indeed, the State of Oklahoma raised similar public interest contentions in its Petition for Rehearing filed in May 1970. The Court summarily denied the Petition for Rehearing on June 1, 1970.

Review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. (See Rule 19, Rules of the Supreme Court.) There are no important reasons asserted which would warrant reconsideration of this case by the Court. As Mr. Justice Douglas stated in his earlier concurring opinion:

> "Only the continuation of a regime of discrimination against these people, which long plagued the relations between the races, can now deny them this just claim." 397 U.S. 620, 640.

The ownership of the river bed by the Cherokee Nation does not inhibit the use of the river for navigation. This point was decided expressly by this Court. 397 U.S. at 635. Accordingly there is no valid reason why the Cherokee Nation should be denied its land.

II. The Decision Below Is Clearly Correct

In fashioning its Petition for Certiorari, the State of Oklahoma in a last ditch effort to frustrate the order of this Court has fabricated issues, the answers to which can be found in the decisions which have already been rendered in this case. The simple matter presented for decision is whether the District Court properly interpreted the decision of this Court and the mandate of the Court of Appeals. The Petitioner contends that the Court must now consider whether the Government granted fee simple title to the bed of the Arkansas River to the Indian Nations in their capacities as sovereigns, or whether the grants were made to them for purely private purposes (Pet. at p. 6). This question has already been decided by this Court. The Petitioner argues that while the Indian Nations may have received fee simple title to the river bed pursuant to the treaties in question, title to such land was stripped from them when Congress enacted the so-called Allotment Acts making way for the admission of Oklahoma to the Union. The linch pin of the petitioner's argument is the premise that ownership of the river bed is tied to "sovereignty." Indeed this is the point asserted by Mr. Justice White in his dissenting opinion. This premise, as the Court of Appeals has noted from the outset, is clearly erroneous. In its first opinion, the Court of Appeals stated in a somewhat different context "the property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments." 402 F.2d 739 at 745. The Court of Appeals in its recent opinion reiterated: "However, we are not concerned with sovereignty, a political issue, but with land

ownership. We believe that this question is answered by the 1906 Act." 461 F.2d 674 at 678.

The issue at stake here is the Cherokee Nation's property right in the land not its political existence. The Cherokee Nation took title and held title for its members. It is a well settled principle of law that title to land once vested, as it was here by the Treaties of 1828, 1838 and 1835 and the patent of 1838, could not be divested by any alleged change in the political attributes of the Nation. In *Brewer-Elliott Oil & Gas Company* v. *United States,* 260 U.S. 77, Mr. Justice Taft speaking for the Court stated, "there was nothing in the admission of Oklahoma into constitutional equality of power with other states which required or permitted the divesting of title [to land]." *Id.* at 88.

The petitioner urges again the arguments raised earlier in this Court that the United States could not grant the title to land under a navigable stream because it was not in the public interest. Petitioner has altered the argument somewhat now to assert that the inclusion of The Cherokee Nation's sovereignty was absolutely necessary to support this Court's opinion that the tribes were granted title to the bed of a navigable river and the minerals beneath it, citing *Shively* v. *Bowlby,* 152 U.S. 1, 38 L.Ed. 331 (1894), and *United States* v. *Holt State Bank,* 270 U.S. 49, 70 L.Ed. 466 (1926). Both cases were fully briefed and argued before the Court. In the earlier appearance here, petitioner argued that the Federal Government's power and right to dispose of public lands was limited.[1] The fact

[1] The State before the Supreme Court argued that the "equal footing-implied trust" doctrine compelled the United States to hold the land in

that The Cherokee Nation was a semi-dependent sovereign, *Worcester* v. *State of Georgia,* 31 U.S. (6 Pet.) 515, and enjoyed a unique political existence, *Atlantic & Pacific Railroad Co.* v. *Mingus,* 165 U.S. 413, 435, 436, in that it exercised quasi-governmental autonomy over its people, has nothing to do with the power of the United States to dispose of its public lands and the property rights transferred by the United States.

The sovereign can convey title to lands under navigable waters as it deems necessary and proper. The scope and the power of Congress to transfer title to lands beneath navigable waters is set forth in *Shively* v. *Bowlby,* 152 U.S. 1, 49:

> ". . . [C]ongress has the power to make grants of land below the high water mark of navigable waters in any territory of the United States whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory."

As was pointed out in *Shively* v. *Bowlby,* 152 U.S. 1, and reiterated in *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77, public purpose is a consideration only when there has been a grant to land under the navigable waters during the period of territorial government. In this

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[1] (Continued)
trust for a future state. Now the State argues that the United States could only dispose of such land to another sovereign since such rivers had to be held for the common good. Such argument is specious.

case Congress did not establish a period of territorial government over the lands owned by the Cherokee Nation. It is well settled that the United States Government may dispose of property in its public domain without limitation. "Congress not only has legislative power over the public domain, [Louisiana Purchase territory was public domain] but it also exercised the power of the proprietor therein." *Alabama* v. *Texas,* 347 U.S. 272 (Per Curiam opinion).

Indeed, the argument raised now, was also advanced and re-asserted in the State's Petition for Rehearing:

> "This Court has in effect overruled *Shively* v. *Bowlby* since it concludes that the United States can dispose of lands under navigable waters just as it can dispose of other public lands" (Pet. for Rehearing p. 5).

The Supreme Court in rendering its decision had clearly answered these arguments:

> "Indeed, it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. See *Shively* v. *Bowlby* . . . Rather the question is whether the United States intended to convey title to the river bed to the petitioners. See *Alaska Pacific Fisheries* v. *United States, supra* . . . 397 U.S. at 633, 25 L.Ed. 2d at 624.
>
> "In many respects, however, the Indians were promised virtually complete sovereignty over their new lands. See *Atlantic & Pacific RR Co.* v. *Mingus,* 165 U.S. 413 . . . We do not believe that petitioners would have considered that they could have been precluded from exercising these *basic ownership rights* to the river bed, and we think it very unlikely that the United States intended otherwise." 397 U.S. at 635, 25 L.Ed.2d at 625. (Emphasis ours.)

The United States executed an agreement with The Cherokee Nation whereby tribal title to certain of the allottable land was extinguished and individual grants of allottable land were made. However, in this same agreement tracts of land remained vested in The Cherokee Nation for the benefit of the enrolled members. Act of July 1, 1902, 32 Stat. 716, 727. At the present time land in Oklahoma is held in the name of The Cherokee Nation for the use and benefit of its members.

The petitioner's assertion that title is an incident of sovereignty ignores the realities of the situation. Sovereignty is a political concept. What is involved in this case is the property concept of title and ownership.

The petitioner here argues as did Mr. Justice White in his dissenting opinion,[2] that The Cherokee Nation having lost substantially all attributes of sovereignty prior to statehood, title to the river bed reverted to the United States. Such argument cannot withstand analysis in the light of the pertinent statutes and decisions of the Supreme Court on this point.

The petitioner contends that the statutes preceding the admission of Oklahoma into the Union stripped The Cherokee Nation of its sovereignty so that it ceased to exist as a tribe, bringing about the condition expressed in the grant.

The clause in question was merely an expression of the United States' right of escheat. *Holden* v. *Joy*, 84 U.S.

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[2] Needless to say, this argument by Mr. Justice White was rejected by the majority opinion and is refuted by the plain statements of the statutes preserving tribal existence. Section 28, Act of April 26, 1906. [34 Stat. 137, 148]

[17 Wall] 211 (1872). The title of The Cherokee Nation to the land granted by the Treaties of 1828, 1833, 1835 and evidenced by the patent of 1838 has been considered by the courts and other Government tribunals and *sustained as fee simple title absolute*. In the celebrated *Outlet* case, the Indian Claims Commission sustained the fee simple title as against grantor, the United States. *Cherokee Nation* v. *United States*, 9 Ind. Cl. Comm. 162 (1961). This point again, was fully and completely briefed in the earlier review of this river bed case in the Supreme Court. As Mr. Justice Douglas noted in his concurring opinion:

> "The title held by these tribes was not the usual aboriginal Indian title of use and occupancy but a fee simple title, cf, *United States* v. *Creek Nation*, 295 U.S. 103, terminable if and when these Indian nations ceased to exist or abandoned the territory—*conditions not yet occurring*." 397 U.S. at 638, 25 L.Ed.2d at 627. (Emphasis added.)

In the Acts of 1902 and 1906, the property rights of the Indian Nations were specifically preserved. Since 1906, many statutes have been passed by Congress preserving the tribes' property rights. See, *e.g.*, Title 25 U.S.C.A. § 933(b), Act of August 26, 1964, P.L. 88-461, 78 Stat. 551; Act of October 21, 1970, P.L. 91-478, 91st Congress H.R. 15624.

Section 27 of the April 26, 1906 Act [34 Stat. 148] specifically provides:

> "That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, *upon the dissolution of said tribes*, shall not become public lands nor property of the United States, but shall be *held in*

trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes. . . ." (Emphasis added.)

Title to the land was provided for by Congress and did not pass to the State under any guise. As was noted in the concurring opinion relative to the effect of said Section 27:

"Certainly, this cession by the tribes of their interest in the river bed of the Arkansas to the United States in trust for their members was no possible vehicle for transferring that title to Oklahoma." 397 U.S. at 641-642, 25 L.Ed.2d at 629.

Section 28 of the same Act [34 Stat. 148] provided:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are *hereby continued in full force and effect for all purposes authorized by law,* until otherwise provided by law, . . ." (Emphasis added.)

To accept the petitioner's argument in this case the Court would have to hold that by the very act establishing the trust for the tribes, the United States violated the trust by disposing of the valuable lands of the trust and giving them to the State of Oklahoma. This certainly is not a reasonable meaning to be obtained from the statute. The United States, as trustee of the Nations, stands in the highest fiduciary relationship. See *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Seminole Nation* v. *United States*, 316 U.S. 286, 296, 297 (1942).

The Congress of the United States clearly resolved the questions and arguments posited here. See also, *Creek Na-*

tion v. *United States*, 318 U.S. 629, 640 (1940), wherein the Court stated:

> "the tribes have not yet been dissolved, and they have had both as a general legal right and by virtue of the very section of the 1906 Act under discussion here, the power to bring actions on their own behalf."

The decision of the Court of Appeals is clearly correct.

III. There Is No Conflict of Decision

The petitioner contends that the District Court and the Court of Appeals misapplied and misconstrued this Court's decision in *Choctaw Nation* v. *Oklahoma*, *supra*, thereby creating a conflict between the decisions (Pet. p. 3). There is no conflict between the decisions of the Supreme Court and the lower courts. As the Court of Appeals noted "a fair reading of the opinions, majority concurring and dissenting of the Supreme Court requires the conclusion that the Supreme Court decided present ownership." 461 F.2d 674 at 677.

To decide the question of present ownership, the Court implicitly, if not expressly, determined that the Indian Nations once having obtained fee simple title never lost it. To assert as the petitioner does that the Supreme Court did not decide the question of present title is to ignore the plain language of the decision and to disregard totally the prior pleadings and prior decisions which form the law of the case in this action.

The Court of Appeals for the Tenth Circuit as did the Supreme Court, has clearly understood the present nature of the Cherokee claim. In its analysis of the applicable

statutes relevant to the affairs of the Five Civilized Tribes the appellate court realized full well that if title had been acquired by the tribes, the Act of April 26, 1906, 34 Stat. 137, required that the lands belonging to the tribes on their dissolution would be held in trust for the use and benefit of the Indians. 34 Stat. 148, 402 F.2d 739, 742; 461 F.2d 674 at 678. Both the Supreme Court and the Court of Appeals recognized that the Oklahoma Enabling Act of June 16, 1906 [34 Stat. 267, 270] provided for Oklahoma's admission to the Union upon the condition:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands . . . and to all lands lying within said limits owned or held by any Indian, tribe, or nation; . . ." 397 U.S. at 635 and 461 F.2d at 677.

In its own constitution (Article I, Section 3), the State incorporated this disclaimer provision.

As Mr. Justice Douglas stated:

> "The bed of the Arkansas *was not allotted*. The next year—1907—Oklahoma was admitted to the Union on an equal footing with the original states. Certainly this cession by the tribes of their interest in the river bed of the Arkansas to the United States in trust for their members was no possible vehicle *for transferring that title to Oklahoma*." (397 U.S. at pp. 641-642). (Emphasis added.)

The Cherokee Nation has been preserved in existence by Section 28 of the Act of April 26, 1906 [34 Stat. 137, 148]. Unlike the action of Congress taken with regard to other tribes, i.e. Menominee Termination Act of 1954; 68

Stat. 250 as amended 25 U.S.C. §§ 891-902. See also *Menominee Tribe of Indians* v. *United States*, 390 U.S. 404 (1968). The Cherokee Nation has been continued in existence for all purposes authorized by law, including the vindication of the past infringements of its property rights.

The mandate to the District Court was for further proceedings *consistent* with the Supreme Court decision. "The opinion of the Court may be consulted to ascertain the intent of the mandate. *In re Sanford Fork and Tool Company*, 160 U.S. 247, 256. The Supreme Court decision is the law of the case. *Banco National de Cuba* v. *Farr*, 383 F.2d 166, 177-178 (2 Cir. 1967), *cer.t den'd* 390 U.S. 956" [*reh. den'd* 390 U.S. 1037] (Pet. A-6). Indeed, the law of the case directs that a lower court *must* follow the decision of a higher court at an earlier stage of the case with regard to everything decided either expressly or by necessary implication. *Munro* v. *Post*, 102 F.2d 686, 688 (2d Cir. 1939).

The judgment of the District Court and the decision of the Court of Appeals are in accord with the original decision of this Court. To do as the petitioner suggests would result in proceedings *inconsistent* with the opinion of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October, 1972

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
APR 14 1971
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

CHEROKEE NATION OR TRIBE OF INDIANS, Plaintiff,	)	
v.	)	NO. 6219
STATE OF OKLAHOMA, et al., Defendants,	)	
CHOCTAW NATION and the CHICKASAW NATION, Intervenors.	)	

PRETRIAL ORDER

On August 19, 1970, following a pretrial conference, the court entered an order determining the issues remaining for disposition in this case. On January 12, 1971, a further order was entered resolving all legal issues raised by the parties except those set out in paragraphs 2, 3 and 7 of the August 19 order. It is the purpose of this order, after a conference with counsel on February 5, 1971, and upon consideration of the briefs submitted to the court, to rule on these issues.

As stated in the order of August 19, 1970, it is the position of the Cherokee Nation that the defendants should be required to account for all moneys paid or due by reason of leases on the portion of the Arkansas river bed here

involved for oil, gas and other minerals, or for other purposes, and that when the amounts have been determined the money should be paid into the registry of the court for distribution to the nation or nations entitled to it. The Choctaw and Chickasaw Nations, on the other hand, in their amended answer filed by leave of court, contend that any taking by the defendants from the surface or subsurface of the river bed was wrongful and reimbursement therefor should be made to the extent of the full value. The view of the State of Oklahoma and the other defendants is that if the State of Oklahoma was not the owner of the river bed, its leases to the other defendants were a nullity and any moneys received should be returned.

From a strictly legal view of the problem, the position of the Choctaw and Chickasaw Nations may be correct, at least in part, and anything taken by the defendants was without authority and ought to be returned. Consistent with this view, any money received by the State of Oklahoma from the other defendants ought to be handed back; it was accepted in payment for leaseholds on land the State did not own. But in the opinion of the court practical considerations in the circumstances of this case require sustaining the position of the Cherokees.

The Cherokee Nation and the Choctaw and Chickasaw Nations owned this strip of land (the portion of the bed of the Arkansas River with which we are concerned here) for nearly 140 years without knowing it, or at any rate without asserting such ownership. For almost 63 years the defendants have labored under the impression that this same piece of property belonged to the State of Oklahoma, and there is respectable opinion that this view was not without reasonable grounds. (See Choctaw, et al. v. Oklahoma, 402 F. 2d 739; dissenting views, 397 U.S. 620). During the period the State has claimed ownership the river has changed its bed many times—gradually, in some places; suddenly in others;

and more recently, by deliberate diversion in connection with the restoration of navigability. To pursue the course proposed by the Choctaw and Chickasaw Nations against the defendants would require an inquiry concerning every segment of the river upon which leases had been executed by the state, not only to determine whether there had been a taking, and if so, the nature and extent, but also to determine whether the river was still flowing where it did when the tribal lands were allotted in severalty, and if not, how it got there. In view of the river's history of meandering it certainly cannot be assumed that every portion of its bed leased by the state belonged at the time to the Indian tribes and not to someone else. In the absence of an assertion to the contrary, therefore, the court is of the opinion that the burden in time and money and expense to the parties and the court is out of all proportion to any recovery reasonably to be expected. Assuming without discussion the unassailability of the Choctaw and Chickasaw Nations' position from a strictly legal view, practical considerations obviate the wisdom of following it. Nor do the equities of the matter favor the Choctaw and Chickasaw position. The mistake of Oklahoma and the other defendants in creating the situation that now exists is certainly no greater than the mistake of the tribes in not recognizing their ownership, or in not asserting it if they did. It is the opinion of the court that justice between the parties can best be served by refusing to go back beyond the present determination of ownership in fixing responsibility and liability for any taking of oil, gas, and other minerals, including sand and gravel, by the defendants. In this connection, it might be pointed out that these Indian Nations are by this view deprived of no greater legal right than persons convicted in violation of their constitutional rights but not now permitted to assert such defense.

If the defendant companies and individuals are not to be held accountable for their takings, if any, from the bed of the Arkansas prior to resolution of the question of own-

ership, it follows that they are not entitled to the return of moneys paid to the State of Oklahoma for leasehold or other interests. The leases were acquired for a variety of reasons no doubt, but whatever the reason, in each instance it was obviously felt to warrant the payment of money. Regardless of the lack of ownership on the part of the State of Oklahoma of the property leased, the other defendants got what they bargained for. This would not be true, of course, if the court accepted the position of the Choctaw and Chickasaw Nations, but it does not. By protecting these defendants against being held accountable for any property belonging to the Indian tribes the court has at the same time, necessarily, precluded the return of sums expended by them for leaseholds from the State of Oklahoma. Their demand for the return of such funds, and the State of Oklahoma's concurrence in such demands, should therefore be denied.

This brings up the problem of what to do about the money received by the State of Oklahoma for leases on property it did not own. It might appear that if the legal relationship between the other defendants and the Indian Tribes is to start with determination by the court of ownership of the river bed, then the legal relationship between the defendant State of Oklahoma and the tribes ought to begin at the same time, which would leave the money in the hands of the State. But this result does not necessarily follow, and should not. The unwillingness of the court to cause the purchase price of the leaseholds to be returned is tied to the unwillingness of the court to permit the tribes to hold such purchasers responsible for anything taken under the leases up to this point. No such gain or loss is involved on the part of the State of Oklahoma; it gains nothing and loses nothing by the ruling. To permit it to keep such moneys, then, would be inequitable in the extreme—a matter which is plain on its face and requires no discussion. It is the opinion of the court, therefore, that all moneys received by the State of Oklahoma from the

other defendants for leasehold interests in the bed of the Arkansas River heretofore claimed by the State were received and have been held in trust for the Cherokee Nation and the Choctaw and Chickasaw Nations, and that the State should now be required to account therefor; and further, that all sums owing therefor but now held in suspense by any defendant should be accounted for to the court by such defendants.

At the several pretrial conferences held during the pendency of this litigation the parties thereto by counsel of record have advised the court that no oil or gas wells have been drilled on any part of the bed of the navigable portion of the Arkansas River between its high water banks; that no oil or gas leases have been executed except on that part of the bed of the Arkansas River below its confluence with the Canadian; and that no sand and gravel leases which represent any significant leasehold payments to the State have been executed on that part of the Arkansas River bed between the confluence of the Grand and the Canadian. The court is of the opinion, therefore, that no evidentiary hearing is required to determine the basis for distributing to the tribes the money which may be deposited with the registry of this court in accounting for leasehold payments made and owing; and that such moneys deposited with the court should be distributed one-half to the Cherokee Nation and one-half to the Choctaw and Chickasaw Nations.

All issues having been resolved by this and preceding pretrial orders, and nothing remaining to be determined upon an evidentiary hearing, judgment will be entered accordingly.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
APR 14 1971
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

CHEROKEE NATION OR TRIBE OF INDIANS, Plaintiff,	)	
v.	)	NO. 6219
STATE OF OKLAHOMA, et al., Defendants,	)	
CHOCTAW NATION and the CHICKASAW NATION, Intervenors.	)	

JUDGMENT

In accordance with the mandate of the United States Court of Appeals, Tenth Circuit, and the pretrial orders heretofore entered in this case under dates of August 19, 1970, January 12, 1971, and April 14, 1971, determining all issues herein involved,

IT IS ORDERED, ADJUDGED AN DECREED that:

1. The plaintiff, the Cherokee Nation or Tribe of Indians, is the owner of the entire bed of the Arkansas River between its high water banks from its confluence with the Grand River to its confluence with the Canadian River, subject only to the right of the United States of America

to restore, maintain, and exercise dominion and control over navigation and to any rights that may now exist in others as a result of avulsive changes in this portion of the river since distribution of the Cherokee lands to individuals.

2. From the confluence of the Canadian River with the Arkansas River to the Eastern Oklahoma line that part of the bed of the Arkansas River between its high water banks which lies north of the main channel is owned by the Cherokee Nation or Tribe of Indians and that part which lies south of the main channel is owned by the intervenors, the Choctaw and Chickasaw Nations, subject only to the rights of the United States of America heretofore stated with respect to navigation and the rights which may have accrued to others by reason of avulsive changes, if any, since the allotment of tribal lands.

3. The defendant the State of Oklahoma has no right, title, or interest in or to any portion of the Arkansas River between its high water banks from its confluence with the Grand River to the Eastern Boundary of Oklahoma.

4. The remaining defendants have no right, title, or interest by reason of any leasehold or other agreement with the State of Oklahoma to any such portion of said river.

5. Neither the plaintiff nor the intervenors, the Cherokee Nation and the Choctaw and Chickasaw Nations, is entitled to an accounting for any oil, gas, or other minerals, including sand and gravel, or any interest therein, except lease rentals, bonus, and royalty payments, taken or acquired by any of the defendants under or by reason of lease agreements with the State of Oklahoma, and said defendants are not entitled to the return of any money paid to the State of Oklahoma for or in connection with such leases.

6. The defendant State of Oklahoma is required to account to the court for all money at any time received pursuant to or under such leases or agreements, and to de-

posit such sums received or owing in the registry of the court within ninety days. Similarly, all other defendants are required to account for and deposit in the registry of the court all money held in suspense or owing by them under such leases or other agreements with the State of Oklahoma.

7. All leases and other agreements between the State of Oklahoma and the other defendants herein on and covering the property here involved which have not expired are hereby cancelled, set aside and held for naught.

8. When the accounting herein required has been made and approved, and the money deposited, the Clerk of this Court is authorized and directed to issue checks distributing one-half to the Cherokee Nation or Tribe of Indians and one-half to the Choctaw and Chickasaw Nations and deliver them to the respective counsel of record for such Nations.

IT IS FURTHER ORDERED that no costs be awarded to the plaintiff or intervenors.

The court is of the opinion that since this order disposes of all issues in the case (except those that may arise by reason of the accounting herein required), and involves controlling questions of law as to which there is substantial ground for difference of opinion, an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly,

IT IS FURTHER ORDERED that in the event of appeal proceedings in the case be stayed in this court pending disposition on appeal.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX C

Excerpts

TREATY WITH THE CHEROKEE, DECEMBER 29, 1835.
(7 Stat. 478, Vol. II, Kappler, 439)
Proclaimed May 23, 1836.

Articles of a treaty, concluded at New Echota in the State of Georgia on the 29th day of Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs Head Men and People of the Cherokee tribe of Indians.

Whereas the Cherokees are anxious to make arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

And whereas a delegation of the Cherokee nation composed of Messrs. John Ross Richard Taylor Danl. McCoy Samuel Gunter and William Rogers with full power and authority to conclude a treaty with the United States did on the 28th day of February 1835 stipulate and agree with the government of the United States to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river, and did agree to abide by the award of the SEnate of the United States themselves and to recommend the same to their people for their final determination.

And whereas on such submission the Senate advised "that a sum not exceeding five millions of dollars be paid to Cherokee Indians for all their lands and possessions east of the Mississippi river."

And whereas this delegation after said award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty which they refused to do, but insisted that the same "should be referred to their nation and there in general council to deliberate and determine on the subject in order to ensure harmony and good feeling among themselves."

And whereas a certain other delegation composed of John Ridge Elias Boudinot Archilla Smith S. W. Bell John West Wm. A. Davis and Ezekiel West, who represented that portion of the nation in favor of emigration to the Cherokee country west of the Mississippi entered into propositions for a treaty with John F. Schermerhorn commissioner on the part of the United States which were to be submitted to their nation for their final action and determination.

And whereas the Cherokee people, at their last October council at Red Clay, fully authorized and empowered a delegation or committee of twenty persons of their nation to enter into and conclude a treaty with the United States commissioners then present, *at that place or elsewhere* and as the people had good reason to believe that a treaty would then and there be made or at a subsequent council at New Echota which the commissioners it was well known and understood, were authorized and instructed to convene for said purpose; and since the said delegation have gone on to Washington City, with a view to close negotiations there, as stated by them notwithstanding they were officially informed by the United States commissioner that they would not be received by the President of the United States; and that the Government would transact no business of this nature with them, and that if a treaty was

made it must be done here in the nation, where the delegation at Washington last winter *urged that it should be done for the purpose of promoting peace and harmony among the people;* and since these facts have also been corroborated to us by a communication recently received by the commissioner from the Government of the United States and read and explained to the people in open council and therefore believing said delegation can effect nothing and since our difficulties are daily increasing and our situation is rendered more and more precarious uncertain and insecure in consequence of the legislation of the States; and seeing no effectual way of relief, but in accepting the liberal overtures of the United States.

And whereas Genl William Carroll and John F. Schermerhorn were appointed commissioners on the part of the United States, with full power and authority to conclude a treaty with the Cherokees east and were directed by the President to convene the people of the nation in general council at New Echota and to submit said propositions to them with power and authority to vary the same so as to meet the views of the Cherokees in reference to its details.

And whereas the said commissioners did appoint and notify a general council of the nation to convene at New Echota on the 21st day of December 1835; and informed them that the commissioners would be prepared to make a treaty with the Cherokee people who should assemble there and those who did not come they should conclude gave their assent and sanction to whatever should be transacted at this council and the people having met in couniel [sic] according to said notice.

Therefore the following articles of a treaty are agreed upon and concluded between William Carroll and John F. Schermerhorn commissioners on the part of the United States and the chiefs and head men and people of the Cherokee nation in general council assembled this 29th day of Decr. 1835.

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles, but as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoliations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoliations that then an additional sum of three hundred thousand dollars be allowed for the same.

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied [sic] and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of county "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down sais Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the

Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied [sic]."

And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby covenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the

west line of the State of Missouri and the Osage reservation beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted and a prorata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

ARTICLE 3. The United States also agrees that the lands above ceded by the treaty of Feb., 14, 1883, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May, 28, 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * * * * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or juris-

diction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the person and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers, mechanics, and teachers for the instruction of Indians according to treaty stipulations.

ARTICLE 7. The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the

Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Represenatives of the United States whenever Congress shall make provision for the same.

ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage-wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided.

* * * * * *

ARTICLE 11. The Cherokee nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund amounting to about fifty thousand dollars shall constitute a part of the permanent school fund of the nation.

* * * * * *

ARTICLE 19. This treaty after the same shall be ratified by the President and Senate of the United States shall be obligatory on the contracting parties.

ARTICLE 20. (Supplemental article. Stricked out by Senate.)

In testimony whereof, the commissioners and the chiefs, head men, and people whose names are hereunto annexed, being duly authorized by the people in general council assembled, have affixed their hands and seals for themselves, and in behalf of the Cherokee nation.

I have examined the foregoing treaty, and although not present when it was made, I approve its provisions generally, and therefore sign it.

William Carroll,

J. S. Schermerhorn.

Major Ridge, his x mark,	(L.S.)	Te-gah-e-ske, his x mark,	(L.S.)
James Foster, his x mark,	(L.S.)	Robert Rogers,	(L.S.)
Tesa-ta-esky, his x mark,	(L.S.)	John Gunter,	(L.S.)
Charles Moore, his x mark.	(L.S.)	John A. Bell,	(L.S.)
George Chambers, his x mark,	(L.S.)	Charles F. Foreman,	(L.S.)
Tah-yeske, his x mark,	(L.S.)	William Rogers,	(L.S.)
Archilla Smith, his x mark,	(L.S.)	George W. Adair,	(L.S.)
Andrew Ross,	(L.S.)	Elias Boudinot,	(L.S.)
William Lassley,	(L.S.)	James Starr, his x mark,	(L.S.)
Cae-te-hee, his x mark,	(L.S.)	Jesse Half-Breed, his x mark,	(L.S.)

Signed and sealed in the presence of—

Western B. Thomas, secretary.
Ben F. Curry, special agent.
M. Wolfe Batman, first lieutenant, six U.S. Infantry, disbursing agent.
Jon L. Hooper, lieutenant, fourth Infantry.
C. M. Hitchcock, M.D. assistant surgean U.S.A.
G. W. Currey,
William H. Underwood,
Cornellius D. Terhune,
John W. H. Underwood.

In compliance with instruction of the council at New Echota, we sign this treaty.

Stand Watie,

John Ridge.

March 1, 1836

Witnesses:

Elbert Herring,
Alexander H. Everett,
John Robb,
D. Kurtz,
Wm. Y. Hansell,
Samuel J. Potts,
Jno. Litle,
S. Rockwell.

* * * * * *

APPENDIX D

Excerpts

THE UNITED STATES OF AMERICA TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians * * it was stipulated and agreed on the part of the United States, * * the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are * * in the words following, that is to say:—

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, * * the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians, * * SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits * * the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS, * * hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the south-east corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; * *

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty. * *

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall me made."—

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the

boundaries whereof are as follows: beginning at a mound of rocks four feet square * * on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river; * * thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with the Canadian river, * * thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the south-west corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high * * thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river; * * thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands,

thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square * * thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square * * thence east along the northern boundary of Creek lands, two hudnred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.—

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof * *

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie, referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be

granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.—

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT, and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President M. VAN BUREN

M. M. GARLAND
Recorder of the General Land Office

APPENDIX E

Act of April 26, 1906, 34 Stat. 137, 148:

SEC. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress.

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

E COPY

Supreme Court, U. S.
FILED
OCT 24 1972
MICHAEL ROBAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-497

STATE OF OKLAHOMA,
Petitioner,

VERSUS

CHEROKEE NATION, CHOCTAW NATION and CHICKASAW NATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS, EASON OIL COMPANY, ET AL., IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF STATE OF OKLAHOMA

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October, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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BRIEF OF RESPONDENTS, EASON OIL COMPANY, ET AL., IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF STATE OF OKLAHOMA

The State of Oklahoma has filed a Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit, to review the judgment entered in that court in the above captioned case on June 1, 1972, Nos. 71-1210 and 71-1295, in that court.

CITATIONS TO OPINION BELOW

The United States District Court, Eastern District of Oklahoma, did not write an opinion. The opinion of the United States Court of Appeals, Tenth Circuit, is reported at 461 F.2d 674 (1972). Copies of the decision of the District Court and of the Court of Appeals are shown in the

Appendices of the Petition of the State of Oklahoma. In addition, the Pretrial Order of April 14, 1971, being an integral part of the judgment of the District Court, is shown in Appendix A to this brief.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 1, 1972, and the order denying rehearing was entered on June 27, 1972. Jurisdiction is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

The questions presented by Petitioner are of great importance but an additional vital question is presented by the decision in the courts below:

> If, upon final determination, it is found that the Indian Tribes, and not the State of Oklahoma, are the present owners of the navigable Arkansas River in Oklahoma, have due process requirements under the United States Constitution been met when the State is required *without an evidentiary hearing,* to pay the Indians the funds held by the State in trust for its lessees, thus denying the lessees the enforcement of their contractual rights to such funds without the opportunity to be heard on the question of use of the lands for which such funds were paid?

STATEMENT OF THE CASE

The Statement of the Case by Petitioner is not complete. The following is necessary to a further understanding of the decision.

The Court of Appeals, after rejecting the claim of Oklahoma to ownership, then noted that:

> "The trial court cancelled all leases given by Oklahoma to the river bed, ordered an accounting for all lease rentals, bonuses and royalty payments and the payment of the amount so received by Oklahoma into the court registry and held, that the lessees were not entitled to the return of anything paid to Oklahoma under the leases." (461 F.2d 678).

The Court of Appeals then concluded:

> "In our opinion Oklahoma has no right to retain the lease considerations. The right thereto lies between the lessees and the Indians. The lessees and Oklahoma made a mutual mistake of law. The documents determinative of title were all a matter of public record. We find nothing to suggest that Oklahoma engaged in conduct which misled or prejudiced the lessees. *The trial court found, and we perceive nothing in the record to dispute the finding, that the lessees 'got what they bargained for.'* The court decree protects the lessees against accountability to the Indians for actions taken under the leases. This includes damages for trespass. The lessees are not entitled to this protection plus return of the money which they paid for the leases.*

---

* While the lessees are appreciative of the District Court's good intentions, the opportunity of being heard on the question of a taking or a benefit was summarily denied by the District Court.

"Whatever might be the situation if we were concerned only with the respective rights of Oklahoma and its lessees, *we are confronted with the fact that the lessees have had the use of the land and have paid Oklahoma, not the rightful owner, therefor. If the lessees were awarded the return of the lease considerations which they have paid to Oklahoma, they would have received the use of the land for nothing and by the decree would be protected against trespass claims by the real owners. Equity will not condone such a result. The lessees are not entitled to return of the lease considerations.*" (461 F.2d 680). (Emphasis ours.)

ARGUMENT

The intended result of the District Court's decree and the affirmance by the Court of Appeals is to protect the lessees against accountability to the Indians for actions taken under the leases, including damages for trespass.

The Court of Appeals holds that the lessees are not entitled to protection against trespass plus return of the money which they paid for the leases. It further states that it is confronted with the "fact" that the lessees have had the use of the land and have paid Oklahoma, not the rightful owner, therefor; that if the lessees were awarded the return of the lease considerations which they have paid to Oklahoma, *they would have received the use of the land for nothing.* What the court below has failed to consider is that the lessees have *not* received the use of the land. This litigation was instituted by The Cherokee Nation or Tribe of Indians in Oklahoma shortly after the lessees purchased oil and gas leases from the State of Oklahoma. Because of the pendency of this litigation, the lessees were

effectively prevented from making any use of the land covered by the leases. There is no evidence that the lessees have explored, prospected, produced oil, gas or any other minerals, shared in production attributable or allocated to the lands covered by the leases or in any other manner received any benefit for the moneys paid to the State of Oklahoma under the terms of the leases. In short, all that the lessees have done is to pay bonus and delay rentals to the lessor, the State of Oklahoma, which it believed in good faith to be the owner of the land, for the *right of use* which they have not been allowed to exercise.

Further, and more important, *the lessees were denied the right to be heard on the question.*

It is significant that the District Court found that "no oil or gas wells have been drilled on any part of the bed of the navigable portion of the Arkansas River between its high water banks; . . ." but that "*no evidentiary hearing is required* to determine the basis for distributing to the Tribes the money which may be deposited with the registry of this Court in accounting for leasehold payments made and owing; . . ." (Emphasis ours.) (Pretrial Order of April 14, 1971 (incorporated into Judgment of April 14, 1971), Record 204, 205, Appendix A-5.)

Moreover, the judgment is inherently defective with respect to the accounting, for it states:

> "The court is of the opinion that since this order disposes of all issues in the case *(except those that may arise by reason of the accounting herein required)*, . . ." (Petition for Certiorari, Appendix B-3). (Emphasis ours.)

As a result, the District Court made the unwarranted assumption that the lessees had received some benefits under the cancelled leases. The judgment of the District Court follows neither law nor equity.

The court's reasoning is found in the Pretrial Order of April 14, 1971 (Record 206, Appendix A-4):

> "The unwillingness of the Court to cause the purchase price of the leaseholds to be returned is tied to the unwillingness of the Court to permit the Tribes to hold such purchasers for anything taken under the leases up to this point."

The Order considers the following as equitable: The lessees purchased from the State of Oklahoma the right to explore for and produce oil and gas in the areas in question. The State received money for this privilege. Shortly thereafter, the filing of the captioned lawsuit deprived the lessees of their right to explore for and produce oil and gas, in that they could not in good faith go upon land which was the subject of a lawsuit. The District Court held that because of the good faith of the lessees, prior to the suit being filed, that they should not be held liable for what they took from the Indians' land: *nothing*. The court further holds that because they are not held liable for what they took, nothing, they received what they bargained for: *the right to explore for and produce oil and gas*. They should, therefore, not receive their money back. This right is terminated by the judgment, even were it not practically terminated by the filing of the lawsuit. The court then holds that because the State has the money and should not pay it back to the lessees, it should pay it to the Indians. We submit that this is gross inequity rather than equity.

The Commissioners of the Land Office of the State of Oklahoma issued these oil and gas leases under a published policy that if the State did not own the land upon which the leases were given, the bonuses and rentals would be returned to the lessees (Appendix B).

Lessees submit that the money paid to the State of Oklahoma under the contractual right for its return if the State was not the true owner is a contract right protected under Amendment V of the United States Constitution—*Highland* v. *Russell Car & Snowplow Co.*, 279 U.S. 253, 73 L.Ed. 691 (1929).

The failure of the court to permit introduction of evidence that the lessees in fact were prevented from exercising any rights under these leases was a failure to grant due process of law to these respondent lessees and denied them "their day in court."

In *Roberts* v. *New York*, 295 U.S. 264, 278, 79 L.Ed. 1429, 1436, Mr. Justice Cardozo explained the requirements of due process with respect to an erroneous proceeding and concluded that *there* the hearing had been "full and candid" and that failure of due process was "something more far-reaching than one of dubious mistake in the appraisal of the evidence." Here, the error in denying the parties an evidentiary hearing is "gross and obvious, coming close to the boundary of arbitrary action."

The District Court's decision was expressly based upon findings of fact. These findings that the lessees took something from the Indians and that they received some benefit from the leases issued by the State were made without the benefit of any evidence to support the findings. An evi-

dentiary hearing was repeatedly requested[1] of the District Court on this question and refused by the pretrial order issued simultaneously with the judgment. The rights of the lessees cannot be arbitrarily forfeited, for the due process clause protects against an unlawful invasion not only by the legislative branch, but also by the courts. *Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island and Pacific RR.*, 294 U.S. 648, 79 L.Ed. 1110 (1935); *Brinkerhoff-Faris Trust and Savings* v. *Hill*, 281 U.S. 673, 74 L.Ed. 1107 (1930).

In the instant case, many titles in and near the entire river were in dispute as a result of movements of the river. In accordance with the written provisions governing leasing by the State, the oil and gas lessees purchased leases from the State allowing them to explore for, and if found, to produce and save oil and gas so long as it was produced in paying quantities, or, if the State did not have title to the leases, the State would return the moneys paid under the lease contracts. Whether the policy letter is enforceable as a separate agreement as in *Brunson, et al.* v. *Commissioners of the Land Office*, 292 Pac. 562 (Okla. 1930),[2] or should be considered as a part of the lease agreement is academic.

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[1] Brief submitted on February 16, 1971, in the U. S. District Court, Headnote IV, page 15. "*An accounting for bonuses, rentals and royalties requires resolution of factual questions through a hearing on the evidence.*" Also see brief submitted to the U. S. District Court on March 15, 1971, Proposition IV, page 7.

[2] That case dealt with leases given by the Commissioners of the Land Office in the south half of the Red River, which was later held by United States Supreme Court to be owned by the United States rather than the State of Oklahoma. As here, the Commissioners had agreed that if the State did not own the land upon which the leases were

See *McKenna* v. *Pan American Oil Corp., et al.*, 200 F.Supp. 468 (E.D. La. 1961); *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970); 15 O.S. 1961, Sec. 163.

> "The Commissioners of the Land Office . . . were vested with the power to enter into said agreements . . . and . . . such contracts were legal and enforceable." *Brunson, et al.* v. *Commissioners of the Land Office.*

Although it was incumbent upon the District Court to retain jurisdiction of the matter to settle the entire controversy of the parties having once taken equitable jurisdiction, it may not depart from recognized legal principles, nor may it create a contract between the parties where none exists. *Hedges, et al.* v. *Dixon County*, 150 U.S. 182, 37 L.Ed. 1044 (1893).

A court of equity has no more right than has a court of law to act on its own notion of what is right in a par-

---

[2] (Continued)

given, the bonuses, rentals and forfeitures would be returned to the lessees. The Supreme Court of Oklahoma held:

> "In the case at bar, the State of Oklahoma had no title to the Red River bed and its attempted leasing thereof was null and void. The defendant commissioners received the money herein involved under an agreement to hold it pending the determination of the ownership of said river bed, and to return it if Oklahoma's title failed. To say that the defendants could transfer this money to the State in violation of such agreement and not incur any obligation to pay the same under such circumstances, *is nothing short of saying that the money of the plaintiffs could be taken without due process of law.* After Oklahoma's title failed, it became the duty of the defendant Commissioners to return this money to the plaintiffs." (Emphasis ours.)

The trial court was directed to issue a writ of mandamus commanding the Commissioners to refund the money deposited as bonuses, rentals and forfeitures.

ticular case. *Rees* v. *Watertown,* 19 Wall. 107, 22 L.Ed. 72 (1874); *Wright* v. *Ellison,* 1 Wall, 17 L.Ed. 555 (1864); *Crocket* v. *Lee,* 7 Wheat. 527, 5 L.Ed. 513.

The attempt by the District Court and the Court of Appeals to "balance the equities" between the Indian Tribes and the State and the lessees violates this principle. The District Court says, in its Pretrial Order of April 14, 1971:

> "If the defendant companies and individuals are not to be held accountable for their takings, *if any,* from the bed of the Arkansas prior to resolution of the question of ownership, it follows that they are not entitled to the return of moneys paid to the State of Oklahoma for leasehold or other interest" (Record p. 203, Appendix A-3). (Emphasis ours.)

The District Court and the Court of Appeals preclude the return of moneys by the State of Oklahoma to the defendant companies and individuals regardless of whether or not there has been any taking! Not only does this result in these defendants being deprived of property without due process of law, contrary to the Constitution of the United States, it even violates Chapters 28 and 29 of Magna Charta *(Rees* v. *Watertown).*

CONCLUSION

If the moneys are refunded to the lessees, the Indians have lost nothing (if it be finally determined that they now have title) for they can hold their own lease sale and otherwise make use of the lands for profit.

These respondents do not disagree with the matters raised by the petitioner, State of Oklahoma. But we wish

to emphasize that the Judgment and Pretrial Order of the District Court are inherently defective and the deprival of a hearing on the question of taking and the benefit or use by lessees is a substantive failure of due process of law and an impairment of these lessees' right to moneys which were paid by them for rights which they were not permitted to exercise. Therefore, for these reasons as well as those stated by petitioner, State of Oklahoma, we urge that certiorari be granted.

Respectfully submitted,

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October, 1972

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED
APR 14 1971
CHARLES N. HASKELL
Clerk, U. S. District Court
By ----------
Deputy Clerk

CHEROKEE NATION OR TRIBE OF INDIANS, Plaintiff,	)	
v.	)	NO. 6219
STATE OF OKLAHOMA, et al., Defendants.	)	
CHOCTAW NATION and the CHICKASAW NATION, Intervenors.	)	

PRETRIAL ORDER

On August 19, 1970, following a pretrial conference, the court entered an order determining the issues remaining for disposition in this case. On January 12, 1971, a further order was entered resolving all legal issues raised by the parties except those set out in paragraphs 2, 3 and 7 of the August 19 order. It is the purpose of this order, after a conference with counsel on February 5, 1971, and upon consideration of the briefs submitted to the court, to rule on these issues.

As stated in the order of August 19, 1970, it is the position of the Cherokee Nation that the defendants should be required to account for all moneys paid or due by reason of leases on the portion of the Arkansas river bed here involved for oil, gas and other minerals, or for other pur-

poses, and that when the amounts have been determined the money should be paid into the registry of the court for distribution to the nation or nations entitled to it. The Choctaw and Chickasaw Nations, on the other hand, in their amended answer filed by leave of court, contend that any taking by the defendants from the surface or subsurface of the river bed was wrongful and reimbursement therefor should be made to the extent of the full value. The view of the State of Oklahoma and the other defendants is that if the State of Oklahoma was not the owner of the river bed, its leases to the other defendants were a nullity and any moneys received should be returned.

From a strictly legal view of the problem, the position of the Choctaw and Chickasaw Nations may be correct, at least in part, and anything taken by the defendants was without authority and ought to be returned. Consistent with this view, any money received by the State of Oklahoma from the other defendants ought to be handed back; it was accepted in payment for leaseholds on land the State did not own. But in the opinion of the court practical considerations in the circumstances of this case require sustaining the position of the Cherokees.

The Cherokee Nation and the Choctaw and Chickasaw Nations owned this strip of land (the portion of the bed of the Arkansas River with which we are concerned here) for nearly 140 years without knowing it, or at any rate without asserting such ownership. For almost 63 years the defendants have labored under the impression that this same piece of property belonged to the State of Oklahoma, and there is respectable opinion that this view was not without reasonable grounds. (See Choctaw, et al. v. Oklahoma, 402 F. 2d 739; dissenting views, 397 U.S. 620). During the period the State has claimed ownership the river has changed its bed many times—gradually, in some places; suddenly in others; and more recently, by deliberate diversion in connection with the restoration of navigability. To

pursue the course proposed by the Choctaw and Chickasaw Nations against the defendants would require an inquiry concerning every segment of the river upon which leases had been executed by the state, not only to determine whether there had been a taking, and if so, the nature and extent, but also to determine whether the river was still flowing where it did when the tribal lands were allotted in severalty, and if not, how it got there. In view of the river's history of meandering it certainly cannot be assumed that every portion of its bed leased by the state belonged at the time to the Indian tribes and not to someone else. In the absence of an assertion to the contrary, therefore, the court is of the opinion that the burden in time and money and expense to the parties and the court is out of all proportion to any recovery reasonably to be expected. Assuming without discussion the unassailability of the Choctaw and Chickasaw Nations' position from a strictly legal view, practical considerations obviate the wisdom of following it. Nor do the equities of the matter favor the Choctaw and Chickasaw position. The mistake of Oklahoma and the other defendants in creating the situation that now exists is certainly no greater than the mistake of the tribes in not recognizing their ownership, or in not asserting it if they did. It is the opinion of the court that justice between the parties can best be served by refusing to go back beyond the present determination of ownership in fixing responsibility and liability for any taking of oil, gas, and other minerals, including sand and gravel, by the defendants. In this connection, it might be pointed out that these Indian Nations are by this view deprived of no greater legal right than persons convicted in violation of their constitutional rights but not now permitted to assert such defense.

If the defendant companies and individuals are not to be held accountable for their takings, if any, from the bed of the Arkansas prior to resolution of the question of ownership, it follows that they are not entitled to the return of moneys paid to the State of Oklahoma for leasehold or

other interests. The leases were acquired for a variety of reasons no doubt, but whatever the reason, in each instance it was obviously felt to warrant the payment of money. Regardless of the lack of ownership on the part of the State of Oklahoma of the property leased, the other defendants got what they bargained for. This would not be true, of course, if the court accepted the position of the Choctaw and Chickasaw Nations, but it does not. By protecting these defendants against being held accountable for any property belonging to the Indian tribes the court has at the same time, necessarily, precluded the return of sums expended by them for leaseholds from the State of Oklahoma. Their demand for the return of such funds, and the State of Oklahoma's concurrence in such demands, should therefore be denied.

This brings up the problem of what to do about the money received by the State of Oklahoma for leases on property it did not own. It might appear that if the legal relationship between the other defendants and the Indian Tribes is to start with determination by the court of ownership of the river bed, then the legal relationship between the defendant State of Oklahoma and the tribes ought to begin at the same time, which would leave the money in the hands of the State. But this result does not necessarily follow, and should not. The unwillingness of the court to cause the purchase price of the leaseholds to be returned is tied to the unwillingness of the court to permit the tribes to hold such purchasers responsible for anything taken under the leases up to this point. No such gain or loss is involved on the part of the State of Oklahoma; it gains nothing and loses nothing by the ruling. To permit it to keep such moneys, then, would be inequitable in the extreme—a matter which is plain on its face and requires no discussion. It is the opinion of the court, therefore, that all moneys received by the State of Oklahoma from the other defendants for leasehold interests in the bed of the Arkansas River heretofore claimed by the State were received

and have been held in trust for the Cherokee Nation and the Choctaw and Chickasaw Nations, and that the State should now be required to account therefor; and further, that all sums owing therefor but now held in suspense by any defendant should be accounted for to the court by such defendants.

At the several pretrial conferences held during the pendency of this litigation the parties thereto by counsel of record have advised the court that no oil or gas wells have been drilled on any part of the bed of the navigable portion of the Arkansas River between its high water banks; that no oil or gas leases have been executed except on that part of the bed of the Arkansas River below its confluence with the Canadian; and that no sand and gravel leases which represent any significant leasehold payments to the State have been executed on that part of the Arkansas River bed between the confluence with the Grand and the Canadian. The court is of the opinion, therefore, that no evidentiary hearing is required to determine the basis for distributing to the tribes the money which may be deposited with the registry of this court in accounting for leasehold payments made and owing; and that such moneys deposited with the court should be distributed one-half to the Cherokee Nation and one-half to the Choctaw and Chickasaw Nations.

All issues having been resolved by this and preceding pretrial orders, and nothing remaining to be determined upon an evidentiary hearing, judgment will be entered accordingly.

s/ Edwin Langley
DISTRICT JUDGE

APPENDIX B

The following published policy of the Commissioners of the Land Office was in effect at the time of the leases:

"POLICY COVERING COMPLETION OF SCHOOL LAND OIL AND GAS LEASES:

As a means of accomplishing an orderly closing of all Oil and Gas Lease sales, the Commissioners of the Land Office have found it necessary to adopt and publish the following policy requiring all Oil and Gas leases to be completed within the time specified in the published notice of sale, or an extension of such time allowed by the Commissioners for good and sufficient reasons. After the completion of the Oil and Gas Lease, should an examination of the abstract disclose defects in the State's title, the purchaser should immediately call such defects to the attention of the Legal Division of the Department. If, in the opinion of the Legal Division the title of the State to the Minerals lease cannot be defeated, the Commissioners will not institute suit to quiet the State's title; however, the Legal Division of the Land Office will cooperate with any lessee desiring to file a suit to quiet title of the leasehold and the Legal Department will assist such lessee in every way possible and furnish or cause to be furnished such information and records as may be available, and the State will join in the action as party plaintiff or defendant, if so requested, as in the judgment of the Legal Department is most advantageous, it being understood, however, that the Commissioners of the Land Office will not assume liability for any of the expense of the litigation.

In cases where the Legal Department determines that the State's title is questionable, suit will then be instituted upon the direction of the Commissioners to quiet the title, and his action will be carried to a final conclusion. If, upon completion of any litigation, it is determined that the State owns a lesser interest than advertised, the lessee shall have

the option of retaining the lease at the total bonus consideration bid, or upon delivery of a release accompanied by a proper request, a refund of the total bonus consideration and any delay rentals paid will be paid by the Commissioners.

/s/ Bill Sharp
Bill Sharp, Secretary
COMMISSIONERS OF THE LAND OFFICE"

In accordance with this policy, the State of Oklahoma instituted suit to quiet title to the lands in question on August 2, 1966, in Case 6143-Civil, U.S.D.C., Eastern District of Oklahoma. Further proceedings in that case were stayed by Pretrial Order dated September 25, 1967 pending resolution of the issues in the case now before this Court.

TABLE OF AUTHORITIES

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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-497

THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

THE CHEROKEE NATION, THE CHOCTAW NATION,
and THE CHICKASAW NATION,
Respondents.

THE BRIEF OF THE CHOCTAW NATION AND THE CHICKASAW NATION IN OPPOSITION TO THE STATE OF OKLAHOMA'S PETITION FOR A WRIT OF CERTIORARI

May It Please the Court:

The arguments advanced by the State of Oklahoma in its petition for a writ of certiorari have no significance unless there is merit to its preliminary statement which argues that in its decision in this case this Court did not decide the present ownership of the navigable portion of the bed of the Arkansas River in Oklahoma. To put it in another way, the State now takes the position that in its decision the only thing this Court decided was who owned the bed of the river in 1830 and 1835; that out of all the extensive research of the parties, the hundreds of pages of

briefs, the arguments which extended over two days in October of 1971 and the reargument last March, and the labors of this Court in reaching a decision, there came only a determination of a question of historic interest which had no relevance to the *raison d'etre* of this lawsuit.

> "For the proper construction of the decree under consideration, regard is to be had to the issues before the court on appeal, the findings applied for and the directions given.[1]
>
> "As the opinion does not always state all that was decided, and sometimes contains broad expressions, it should be read in the light of what was necessarily involved and under consideration, without giving its language a strained construction."[2]

To determine ". . . the issues before the court on appeals and the findings applied for . . ."[1] *supra*, a quick reference to the postures assumed by the parties in their pleadings and in their briefs, will be helpful.

In its complaint the Cherokee Nation said:

> "VI. That on April 26, 1908, pursuant to the provisions of Section 27 of an Act of Congress of that date (34 Stat. 137), fee title to the said river bed lands described herein, 'as lands belonging to the Cherokee Tribe', passed to and became vested in the United States of America in Trust for the use and benefit of the members of said Cherokee Nation or Tribe, and their respective heirs, and that said Trust title exists today undiminished and unextinguished."

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[1] *Kansas City Southern Railway Co.* v. *Guardian Trust Co.*, 281 U.S. 1, 10. Last paragraph, second column 74 L.Ed. 659 at page 667.

[2] First paragraph, first column, 5B C.J.S. 542.

The Cherokees also alleged that the State had collected large sums of money from leases on the river bed and it prayed for:

> "VII. . . . judgment against the said corporate and other defendants requiring them to pay all future royalties derived from their respective leases to the United States of America as Trustee . . . and an order restraining each and every defendant from interfering in any manner or form after final judgment herein with the rights of either the United States or the said Cherokee Nation . . . in their peaceful possession and lawful use of the said property."

In its Counter Claim the State prayed:

> ". . . that plaintiff take nothing by reason of its complaint and that this defendant by reason of its Counter Claim have judgment herein quieting its title to the bed of the Arkansas River as described in the Complaint, and for the possession thereof and for such other and further relief as the Court may deem just and proper."

In this Counter Claim in this action the Humble Oil and Refining Company prayed:

> ". . . that plaintiff take nothing by reason of its Complaint and that this Defendant by reason of its Counter Claim have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in the Complaint, insofar as such bed lies within the above described sections. . . ."

Likewise in this Counter Claim in this action the Marathon Oil Company prayed:

> ". . . that plaintiff take nothing by its Complaint and that this defendant, by reason of its Counter Claim,

have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in said Complaint insofar as said bed lies within Section 35, Township 10 North, Range 25 East, State of Oklahoma, and insofar as plaintiff's complaint might cloud its title to other interests in land which it may own in the lands described in Plaintiff's Complaint lying within the State of Oklahoma, and for quiet and peaceful possession thereof."

In their answer and reply in this action the Choctaw Nation and the Chickasaw Nation prayed:

". . . that the full, legal and equitable title in and to the said real property be quieted and confirmed in them and that the other parties to this action and each of them be required to answer herein and set up the nature and extent of their respective claimed interest in and to the said real property, and that upon the final hearing, such claimed interest be adjudged junior and inferior to the title of these intervenors and that the full, legal and equitable title in and to all of the said real property be quieted and confirmed in these intervenors and against all of the other parties herein, and that each of the other parties herein be forever barred and enjoined from claiming or asserting any right, title, interest, lien, estate or equity in and to the said real property, or any part thereof, adverse or hostile to these intervenors. . . ."

The trial court's pre-trial order recited that one of the issues common to all of the cases which had been filed involving the Arkansas River was:

". . . the ownership of the bed of the Arkansas river below the confluence with the Grand River."

In the first judgment entered in this case this court adjudicated:

> "... that against the Cherokee Nation and the Choctaw and Chickasaw Nations, now claiming ownership thereof as unalloted lands of their western domains, the title of the State of Oklahoma, and of all defendants herein claiming an interest through the State, is quieted and said tribes are barred and enjoined from asserting ownership or other claims adverse to said defendants; and that said Indian tribes have no right or interest in any money or other proceeds realized or which may be realized by the State of Oklahoma or the other defendants from the lease or rental or other use of said lands."

When this cause was first before the Circuit Court of Appeals the State in its brief posed what it considered to be the single issue in the case: [3]

> "In the treaties with the Cherokees and the Choctaws and the patents authorized by the treaties, did the United States definitely and plainly express an intention to convey the river bed of the Arkansas River below its confluence with the Grand River to the Cherokees or the Choctaws?"

In pursuance of what it stated to the Circuit Court of Appeals to be the single issue in the case the State said further in its brief: [4]

> "It is the position of the Appellees that the United States, consistent with its public policy declared many times with respect to the territories which it held and from which future states were later formed, did not in its treaties or patents with or to the Cherokees or

[3] To be found at page 2 of its answer brief.

[4] To be found at page 3 of its answer brief.

the Choctaws definitely declare or otherwise make very plain an intention to convey the navigable portion of the Arkansas river bed here involved to the Cherokees or the Choctaws. Therefore, the river bed was not granted to the Cherokees or the Choctaws and remained vested in the United States. It became the property of Oklahoma when the State was created."

In the "Summary and Conclusion" to its brief to the Circuit Court of Appeals the State said: [5]

"In our argument we have demonstrated that:

"1. The State of Oklahoma acquired title to the bed of the navigable portions of the Arkansas River when it became a state.

"2. Neither the treaties nor the patents provide for the conveyance of the Arkansas river bed to the Cherokees or to the Choctaws.

"3. In the United States consistently since independence streams navigable in fact have been navigable in law.

"The United States acquired Oklahoma as a part of the Louisiana Purchase in 1803, and with respect to Oklahoma has consistently maintained its general policy of retaining title to the navigable river beds for the benefit of the future states. When Oklahoma was admitted as a state it was admitted on an equal footing with the original states and acquired title to the Arkansas river bed between its confluence with the Grand River and the state line of Arkansas. The United States did not convey this portion of the Arkansas river bed to the Cherokees or to the Choctaws in the treaties with them or the patents to them. Since there was no plain and definite conveyance to either of them,

[5] To be found at page 45 of its brief.

there was no reason for the United States to reserve the river bed. It was not necessary to reserve something that the United States already owned and had not conveyed. The fact that the river ran through lands conveyed to the Cherokees and lay between the lands conveyed to the Cherokees and the Choctaws was not material in view of the fact that the United States did not definitely and expressly convey it to either of them.

"The judgment of the trial court should be affirmed."

In its first opinion in this case the Circuit Court of Appeals commenced its opinion with this sentence: [6]

"This controversy concerns the ownership of the bed of the Arkansas River and the Oklahoma-Arkansas boundary."

and in its second paragraph the Circuit Court of Appeals said:

"The Cherokees sued Oklahoma and the holders of various sand, gravel, oil, and gas leases granted by Oklahoma and covering parts of the land in dispute. The relief sought was an accounting and an injunction. Oklahoma and various of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert their claims of ownership to a portion of the riverbed."

In its opinion the Circuit Court further said: [7]

"Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to make such divestiture.

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[6] The *Cherokee Nation* v. *Oklahoma*, 402 F.2d 739, 741, 742.

[7] First paragraph, second column, 402 F.2d 739, 745.

Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent 'very plain.'"

Rule 40 of the Rules of this Court provides:

"1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

* * * * * *

"(d) (1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. *The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.* (Emphasis supplied.)

"(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. *Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.* (Emphasis supplied.)

* * * * * *

"3. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and except that items (a), (b), (c) and (d) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side."

The State was not satisfied with the statements of the questions presented by the Cherokee Nation and the Choc-

taw and Chickasaw Nations in their brief to this Court. So, pursuant to Section 3 of Rule 40 it stated what it considered to be the real question for review, saying: [8]

> "Respondents controvert the statement of the 'Questions Presented' in the Brief of the Cherokees and the statement of the 'Questions Presented for Review' in the Brief of the Choctaws, and the statement of the 'Question Presented' in the Brief for the United States as Amicus Curiae, on the ground that each of those statements ignores *the real question which Respondents submit is this*: (Emphasis supplied.)
>
> 'In the treaties with the Cherokees and the Choctaws, and in the patents authorized by the treaties did the United States definitely and plainly express an intention to convey the river bed of the navigable Arkansas River in Oklahoma below its confluence with the Grand River?' "

In the first sentence of its *"Preliminary Statement"* in its brief to this Court, the State said: [9]

> "The question to be resolved is simple and direct. Did the United States convey or agree to convey the river bed to the Cherokees or the Choctaws?"

And continuing in its *"Preliminary Statement"* the State of Oklahoma said: [10]

> "To avoid the stark criterion which we have stated above, Petitioners have presented a voluminous and irrelevant mass of data which should not becloud the

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[8] To be found at pages 2 and 3 of the State of Oklahoma's brief to this Court.

[9] To be found at page 9 of the State of Oklahoma's brief to this Court.

[10] To be found at page 10 of the State of Oklahoma's brief to this Court.

only question that need concern this Court: Did the United States agree to convey or convey the river bed?"

Concluding the *"Preliminary Statement"* in its brief to this Court the State said:[11]

"In Section I of our Argument we will demonstrate the basis of Oklahoma's title to the navigable river bed.

"In Section II we will demonstrate that in the treaties and patents and attendant circumstances there is no evidence of an intention to convey the bed of the navigable river to either of Petitioners.

"In Section III we will demonstrate that at the time of the treaties there were specific and compelling reasons for retention by the United States of title to the navigable portion of the Arkansas River bed, apart from policies common to all navigable waters.

"In Section IV we will demonstrate that the provisions in the treaties that the lands ceded to each of Petitioners would not, without their consent, be included within the limits of any Territory or State, were not inconsistent with the policies, powers and rights of the United States to form a State from an area which included the lands ceded to the Petitioners."

In Section I of the State's brief in which it said in its *"Preliminary Statement"* it would demonstrate the basis of its title to the river bed is opened by the topical heading set in upper case bold face type:[12]

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[11]To be found at page 10 and at page 11 of the State of Oklahoma's brief to this Court.

[12]To be found at page 11 of the State's brief to this Court.

"THE STATE OF OKLAHOMA ACQUIRED TITLE TO THE BED OF THE NAVIGABLE PORTIONS OF THE ARKANSAS RIVER WHEN IT BECAME A STATE."

Arguing this proposition the State said: [13]

> "Promptly upon achieving statehood, Oklahoma became vested with the title to the river bed of the Arkansas river under its navigable portions located below high water mark."

In its concluding paragraph of its argument of this proposition the State said: [14]

> "Under the facts of this case, the State of Oklahoma acquired title to the bed of the navigable portions of the Arkansas River when it was admitted as a State on an equal footing basis. *No conveyance by the United States of the navigable portion of the Arkansas River bed had been made previous to Oklahoma statehood.*"

In the two concluding sentences in its brief to this Court the State of Oklahoma said: [15]

> "Moreover, prior to admission of Oklahoma as a State, the United States secured the consent of Petitioners to relinquishment of tribal ownership of the lands and to allotment of the lands to the individual tribal members and to the United States Citizenship for the tribal members. As citizens they voted on the question of admission of Oklahoma to the Union."

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[13]To be found at page 22 of the State's brief to this Court.

N.B. The State continues its argument of that proposition from page 22 through page 41 of its brief.

[14]To be found at page 41 of the State's brief to this Court.

[15]To be found at page 94 of the State of Oklahoma's brief to this Court.

In the first paragraph of its opinion in this case this Court said:

> ". . . As a practical matter what is at stake is the ownership of the minerals beneath the bed and of the dry land created by navigation projects that are narrowing and deepening the river channel."

And in the second paragraph:

> ". . . In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had been since 1835 the absolute fee owner. . . . Subsequently, petitioners, Choctaw and Chickasaw Nations sought and were granted leave to intervene in the case in order to present their claims that part of the river bed belongs to them" (page 617, L.Ed.2d).

These are the grounds upon which the State sought a rehearing:

"I. The majority here overlooked the critical distinction between the law governing navigable water beds and the law governing non-navigable beds. The decision in Brewer-Elliott upon which the majority opinion placed heavy reliance patently was not based on 'essentially similar' facts—and the Court there expressly refused to pass upon the questions presented here.

"II. The majority's conclusion that 'The United States can dispose of lands underlying navigable waters just as it can dispose of other public lands' is contrary to and overrules Shively v. Bowlby, 152 U.S. 1, 38 L.ed. 31, (1893), and all other pertinent previous and subsequent decisions. Its effect is to

reduce the sovereign State of Oklahoma to an unequal and inferior status in relation to her forty-nine sister states.

"III. The majority's holding as to title to the river bed is completely in conflict with its own finding as shown in the following quotation from its opinion: 'Turning then to that question, we think it clear, as did the Court of Appeals, that the parties to the treaties and patents did not pause specifically to provide for the ownership of the river bed.'

"IV. The good intentions of those joining in the majority opinion will not be served by the results of that opinion."

If the State felt that the abstractions now urged by it were "substantial grounds . . . although not previously presented . . .", it was required by Rule 58 to ". . . briefly and succinctly state" them.

The single contention of the State was that it became the owner of the river bed when it was admitted to the Union. Under Rule 40 the question of whether Oklahoma acquired title to the bed of the river when it became a State was deemed by the Supreme Court ". . . to include every subsidiary qustion fairly comprised therein." The State posited its claim of ownership upon the basic proposition that the United States owned the bed of the river at the time of statehood. The question: "Did the United States own the river bed when Oklahoma became a state?" "'. . . fairly comprised . . .' the '. . . subsidiary question(s). . . .'" (1) Had the United States in its treaties ceded the river bed to the Indian tribes in their "sovereign capacity" (as defined by the State), and (2) if so, had the "sovereign capacity" of the Indian tribes (as defined by the State)

eroded away so that the ownership of the river bed had become re-invested in the United States? and (3) was the bed of the river owned by riparian allottees at the time of statehood?

If the title to the river bed passed by the treaties to the Indian tribes then how it became re-invested in the United States must necessarily have been a ". . . subsidiary question . . ." that had to be gotten out of the way as an incident to establishing the ownership of the United States. Likewise, if the State claimed by prescription against riparian allottees then how the riparian allottees became owners of the river bed was also a ". . . subsidiary question . . ." that had to be gotten out of the way. The abstractions now advanced by the State were subsidiaries to the issue upon which it posited its claim of ownership. But, even if it were not so, the State did not present any of those abstractions to the Supreme Court when it had the opportunity and was required to do so under Rule 40 and Rule 58 and they must now be disregarded.

The logic of Rule 40 and Rule 58 of this Court is compelling and needs no defense. To the end that judicial procedure may be orderly, those rules restrain chameleonic adventures and prevent appeals by piecemeal. They say with all of the finality with which this Court can speak that questions which might have been raised on the former appeal but were not then urged are deemed to be waived. And singly or in combination they reflect the universal rule that on remand the Court will not consider matters appearing in the original record which might have been corrected on the first hearing but were not urged.

Mr. Justice Harlan, delivering the opinion of the Court in *Illinois, ex rel. Hunt* v. *Illinois C. R. Company*, 184 U.S. 78, 92, 46 L.Ed. 441, 447, quoting from *Roberts* v. *Cooper*, 20 How. 467, 481, 15 L.Ed. 969, 973, said:

> "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its member . . . we can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial. To the same effect are numerous cases, some of which are cited in the margin."

In *United States* v. *Camou*, 184 U.S. 572, 574, 46 L.Ed. 694, 696, the Court speaking through Mr. Justice Shiras referred to *Illinois, ex rel. Hunt* v. *Illinois C. R. Company* and repeated the cited language. Further citations from the almost endless number of decisions out of which Rule 40 was germinated would unecessarily burden the Court and we will restrain ourselves from doing so.

The Tenth Circuit in its opinion on the second appeal answered the State's argument:

> "Oklahoma and its lessees argue that the Supreme Court did not confirm present title to the river bed in the Indians but decided only that they received ownership under the grants and treaties of 1830 and 1835. Hence, they say that the question of present ownership is still open. We do not agree.

"Present ownership has been at stake since the inception of the suit. The Cherokees sued for an accounting for money received under the Oklahoma leases, for future rentals or royalties, and for an injunction against interference with the use of the bed. Without present ownership, they could not be entitled to the relief sought. Oklahoma and its lessees denied the claims of the Indians. The fact that the arguments in the court of appeals and in the Supreme Court centered around the construction and effect of grants and treaties did not remove the question of present ownership. Unless present ownership was at stake, the opinions of both the court of appeals and the Supreme Court were futile, academic exercises. If the Indians had divested themselves of ownership, a determination of past ownership was valueless so far as the presented issues were concerned. Without a claim of present ownership, there was no case or controversy within the meaning of Art. III, § 2, of the United States Constitution. Federal courts decide only cases and controversies. Muskrat v. United States, 219 U.S. 346, 361. The Supreme Court does not decide 'abstract, hypothetical or contingent questions.' Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 284.

"A fair reading of the opinions, majority, concurring, and dissenting, of the Supreme Court, requires the conclusion that the Supreme Court decided present ownership. See 397 U.S. at 621, 638-639, and 643."

Respectfully submitted,

LON KILE
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Hugo, Oklahoma 74743
Counsel for the Choctaw Nation and the Chickasaw Nation

October, 1972

FILE COPY

FILED
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-487

THE STATE OF OKLAHOMA,
Petitioner,

v.

THE CHEROKEE NATION, THE CHOCTAW NATION, and THE CHICKASAW NATION,
Respondents.

REPLY TO RESPONSE OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA AND BRIEF OF RESPONDENTS EASON OIL COMPANY, *ET. AL.*, IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF STATE OF OKLAHOMA

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Counsel for the Cherokee Nation

November, 1972

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STATUTES AND RULES

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-497

THE STATE OF OKLAHOMA,
Petitioner,

v.

THE CHEROKEE NATION, THE CHOCTAW NATION, and THE CHICKASAW NATION,
Respondents.

REPLY TO RESPONSE OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA AND BRIEF OF RESPONDENTS EASON OIL COMPANY, *ET. AL.*, IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI OF STATE OF OKLAHOMA

PRELIMINARY STATEMENT

On October 12, 1972 and October 24, 1972, the Commissioners of the Land Office of the State of Oklahoma and the Eason Oil Company and the Mobil Oil Corporation filed pleadings in this Court under the guise of

responses to the Petition for Writ of Certiorari which had been filed by the State of Oklahoma. These pleadings are not responses, but are, in truth, additional petitions for certiorari, raising new questions for consideration and furnishing new arguments not raised in the Petition of the State of Oklahoma. The parties who have filed these pleadings were and are the same parties who were joined as defendants in the original action for an accounting and whose interests throughout the proceeding thus far, in all previous briefs in the Court of Appeals and in this Court have been represented by the State of Oklahoma. The pleadings filed by the Commissioners of the Land Office and the two oil companies are procedurally defective and substantively infirm.

PROCEDURAL DEFECTS

The United States Court of Appeals for the Tenth Circuit entered its order denying the request for a rehearing filed on behalf of the appellants on June 27, 1972. Pursuant to the requirements of the 28 U.S.C.A. 2101(c) any writ of certiorari intended to bring any judgment or decree in a civil action before the Supreme Court for review shall be applied for within ninety days after the entry of such judgment or decree. The ninety day period for petitioning for writ of certiorari has been considered by this Court to be a jurisdictional matter. Application for certiorari must be made within the time limits provided by law. *Bradford Electric Light Co., Inc. v. Clapper, N.H.*, 284 U.S. 221; *Citizens Bank v. Opperman*, 249 U.S. 448. See also *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; *Nebraska v. Pink*, 317 U.S. 264. Accordingly any and all petitions for certiorari in this case had to be filed no later than September 25, 1972.

Rule 21(6) of the Supreme Court Rules specifically provides:

> "... All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers provided for the petitioner, except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition."

The Commissioners of the Land Office and Eason Oil and Mobil Oil are not respondents as that term is generally understood. The petition filed by the State of Oklahoma represent their interests. See *Provident Trademens B&T Co. v. Lumbermens Mutual Casualty Co.*, 411 F.2d 88 (3d cir. 1969).

The pleadings filed by these parties raise new questions and new arguments properly required to be set forth in a Petition for Certiorari.

These parties have ignored the jurisdictional time limits established for review. The Commissioners of the Land Office of the State of Oklahoma filed their pleading on October 12, 1972 fully 107 days after the date of the order denying rehearing and only thirteen days prior to the date when the opposition of the Cherokee Nation or any other opposing party would be due. Eason Oil and Mobil Oil filed their pleading on October 24, 1972 fully almost 120 days after the date of the denial of the rehearing, and indeed, after the opposition of the Cherokee Nation had been filed. These parties have made no attempt to comply with the Rules of this Court. The filing of such late pleadings prejudices the rights of the Cherokee Nation and any party seeking to oppose such petitions.

Pursuant to the Rules of this Court briefs in Opposition must be filed within 30 days after receipt of a petition. Yet during this period while the Cherokee Nation was

preparing its opposition to what should have been the petition for all parties, additional arguments and questions were being prepared by the Commissioners of the Land Office, Eason and Mobil. Indeed the Cherokee Nation never received a copy of the Eason-Mobil pleading prior to the filing of its opposition. Such conduct violates elemental fairness and should not be condoned.

SUBSTANTIVE INFIRMITIES

A. Commissioners of the Land Office

The Commissioners of the Land Office urge as an additional argument for granting the petition that the fact that after Statehood the Indians did not sell sand or gravel evidences a tacit meeting of the minds that title to the river did indeed pass to the State of Oklahoma. Such argument is specious and has already been foreclosed by the prior decision of this Court. This Court clearly recognized the fee simple nature of the Cherokee Nation's title which was not the usual Indian title of use and occupancy. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634-636.

Whether the Indian Nations, after Statehood, did or did not take sand and gravel from the river bed is not a decisive fact. As a practical matter under the State Court decisions existing prior to this Supreme Court decision, the Indians were prohibited from exercising any right of ownership. The exercise of the Indians' rights of ownership is precisely what this suit is all about and what this Court has already decided.

B. Eason Oil Company and Mobil Oil Corporation

These parties have raised in their pleading an entirely new and different question for review. These Oil Companies

assert that as lessees they were denied the right to be heard on the question of their rights under the leases with the State. This argument is not new or persuasive. This precise question was submitted to the District Court for decision and briefed by all parties. The State of Oklahoma and the various Oil Companies presented the District Court with this argument and facts here presented. The Oil Companies have had their day in court. The District Court, sitting as a Court in Equity, reached the fairest and best result in a difficult situation. The Court of Appeals recognized that fact in its affirmance. *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674, 679-680 (10th cir. 1972). The District Court did not act arbitrarily or capriciously, but in accord with the operable decisions. See *Minski v. United States*, 131 F.2d 614 (CCA Mich. 1943) aff'd 319 U.S. 463.

Due process requirements are flexible and differ in response to the nature of the proceeding and character of the rights affected. *Hunter v. City of Ann Arbor*, 325 F. Supp. 847 (D.C. Mich. 1971). In the case here presented the District Court did not abuse its discretion in formulating the relief to be afforded the parties.

CONCLUSION

For the reasons here stated, the pleadings filed by the Commissioners of the Land Office of the State of Oklahoma and by the Eason Oil Company, *et. al.*, should be rejected and the Petition for Writ of Certiorari denied.

Respectfully Submitted,
EARL BOYD PIERCE
ANDREW C. WILCOXEN
PAUL M. NIEBELL
MICHAEL S. YAROSCHUK

November, 1972

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 1972, three copies of the Petition for Writ of Certiorari were mailed, with postage prepaid thereon, to all parties required to be served as follows:

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-497

THE STATE OF OKLAHOMA, PETITIONER

v.

THE CHEROKEE NATION, THE CHOCTAW NATION, AND THE CHICKASAW NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM IN OPPOSITION FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General, on behalf of the United States, submits this memorandum *amicus curiae* in opposition to the petition for a writ of certiorari.

QUESTION PRESENTED

Whether the court of appeals erred in confirming title to certain portions of the bed of the Arkansas River in the Cherokee, Choctaw and Chickasaw Indian Tribes.

INTEREST OF THE UNITED STATES

As the grantor to the respondents of title to the lands in question the United States is interested in

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assuring that the grant is interpreted in accordance with the intent of the treaties by which the grant was made as established by this Court in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620.

STATEMENT

1. The Cherokee Nation, an Indian Tribe, initiated this action in December 1966, demanding an accounting of the proceeds from mineral leases issued by the State of Oklahoma on lands in the bed of the Arkansas River in Oklahoma below the Grand River. The Cherokees claimed title to the entire bed of the Arkansas River where it flows through the interior of Cherokee lands (from the confluence of the Grand River to the confluence of the Canadian River) and to half of the bed of the river where the Cherokee Tribe owns the north bank. The Choctaw Nation, joined by the Chickasaws who have an undivided one-fourth interest in this portion of Choctaw lands, intervened and claimed the entire bed of the river in the area where it is the common boundary between the two Tribes' lands (from the Canadian River to the Oklahoma-Arkansas state line at Fort Smith). The district court rejected the claims of the three Indian Tribes, and the court of appeals affirmed. 402 F. 2d 739 (C.A. 10). This Court, on writ of certiorari, reversed and remanded, holding that, under the applicable treaties, the United States had conveyed title to the bed of the Arkansas River to the Tribes and that the State of Oklahoma did not own and could

not lawfully lease the river bed. *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620. On remand, the district court, in accordance with this Court's ruling, decreed among other things that the disputed portion of the river bed is owned by the three Tribes and further determined which portion belongs to each Tribe.

The State of Oklahoma appealed the portion of the decision affirming Indian ownership of the riverbed. The court of appeals affirmed that portion of the district court's decision, and reversed the portion of the decision partitioning ownership between the Tribes. Petitioner now seeks review in this Court of that portion of the court of appeals' decision holding that ownership of the riverbed is in the Indian Tribes.

ARGUMENT

The question presented in the present petition is the same issue decided adversely to petitioner when this case was last before this Court—whether the State of Oklahoma or the respondent Indian Tribes own certain portions of the bed of the Arkansas River and consequently the mineral production from those lands. *Choctaw Nation* v. *Oklahoma, supra.* The thrust of petitioner's argument is that in some way this Court in *Choctaw Nation* spoke only historically and did not decide that the respondent Tribes rather than petitioner now own the bed of the river, and its mineral production. However, both the Court's opinion and the dissent in *Choctaw* state clearly that what was there at stake was present ownership of

the riverbed. Mr. Justice Marshall, writing for the Court, stated (397 U.S. at 621):

> These cases involve a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake is the ownership of the minerals beneath the river bed and of the dry land created by navigation projects that are narrowing and deepening the river channel.

And Mr. Justice White, dissenting, stated (*id.* at 643):

> At issue in these cases is the ownership of the lands underlying the Arkansas River from its confluence with the Grand River in Oklahoma downstream to the western border of Arkansas.

In resolution of these issues the Court reversed the judgment of the court of appeals that title was in the State of Oklahoma, and held that the Tribes own the riverbed in question. *Id.* at 635–636. To read the *Choctaw* opinion as deciding less than this ignores the reversal of the court of appeals' previous judgment and is tantamount to saying that this Court engaged in a meaningless exercise, since resolution of the historical question alone would have had no practical application in concluding the controversy before the Court.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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